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Statutory Misinterpretations: A Legal Autopsy

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If the Supreme Court is willing to learn from past mistakes,[1] the Court would find it particularly instructive to re-examine the now quite numerous civil rights decisions which have failed to survive congressional scrutiny. The United States Reports are today littered with the corpses of short-lived opinions purporting to interpret federal anti-discrimination statutes; most were dead on arrival in the bound volumes. October Term 1988 was a veritable Pickett's Charge of conservative misinterpretation. *Patterson v. McLean Credit Union*[2] briefly displaced and destroyed much of section 1981; *Public Employees Retirement System v. Betts*[3] temporarily overran parts of the Age Discrimination in Employment Act; *Dellmuth v. Muth*[4] for a time made substantial inroads into the Education of the Handicapped Act, while four other opinions attacked the viability of Title VII.[5] All for naught. By the end of the next Congress, every one of these decisions had been felled by legislative action. The Civil Rights Act of 1991, wiping out in one blow eight different Supreme Court decisions, was an historically unique repudiation of judicial interpretation of the nation's statutes; not since the post-Civil War amendments obliterated *Barron*

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1 In several of the cases discussed below, the dissenting opinions warned in vain that the majority's methodology had previously led to results that were overturned by Congress. West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1154-55 (1991) (Stevens, J., dissenting); Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 191 n.9 (1989) (Marshall, J., dissenting); Dellmuth v. Muth, 491 U.S. 223, 240-41 (1989) (Brennan, J., dissenting).

2 491 U.S. 164 (1989).

3 492 U.S. 158 (1989).

4 491 U.S. 223 (1989).

5 Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989); Martin Wilks, 490 U.S. 755 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

v. City Council of Baltimore[6] and *Dred Scott v. Sandford*[7] had Congress attacked the work of the Court with such ferocity.

The legal carnage wrought by the 1991 Civil Rights Act was unprecedented, but not unforeseeable. Prior to the late 1970's, it was uncommon for Congress to denounce and overturn a Supreme Court decision on the ground that the Court had misinterpreted the law. But from 1978 to 1990 Congress had repeatedly been compelled to take that once extraordinary action, adopting a total of eight different statutes overturning Supreme Court decisions which Congress believed had misread the statutes involved. Even before the 1991 Civil Rights Act, Congress had made unmistakably clear that there were fatal flaws in the way in which Chief Justice Rehnquist and his conservative colleagues were interpreting these laws.

Barely three months after the 1977 decision in *United Air Lines, Inc. v. McMann*,[8] Congress overturned the holding in that case as "erroneou[s]" and inconsistent with the "clear explanation of legislative intent."[9] In 1978, the Pregnancy Discrimination Act[10] nullified the Supreme Court's decision in *General Electric Co. v. Gilbert*;[11] the House report insisted that "the dissenting Justices correctly interpreted the Act", and warned that "the Supreme Court's narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment."[12] The Voting Rights Act Amendments of 1982[13] rejected the holding in *City of Mobile v. Bolden*[14] that section 2 of the Voting Rights Act does not forbid election practices with a discriminatory effect; the Senate Committee insisted that restoration of the discriminatory effect rule was "consistent with the original legislative understanding of Section 2," explaining that legislative history supporting an effect rule was "the most direct evidence of how Congress understood

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6 32 U.S. 243 (1833).

7 60 U.S. 393 (1857).

8 434 U.S. 192 (1977).

9 S. REP. NO. 493, 95th Cong., 1st Sess. 10 (1977).

10 Pregnancy Discrimination Act of 1978, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)).

11 429 U.S. 125 (1976).

12 H.R. REP. NO. 948, 95th Cong., 2d Sess. 2-3 (1978).

13 Voting Rights Act Amendments of 1982, § 2, 96 Stat. 131, 134 (1982) (codified at 42 U.S.C. § 1973b (1988)).

14 446 U.S. 55, 60-61 (1980).

the provision."[15] The Court's decision in *Smith v. Robinson*,[16] regarding remedies for children unlawfully denied special education classes, was set aside by the Handicapped Children's Protection Act of 1986[17] as contrary to "Congress' original intent."[18] In *Grove City College v. Bell*[19] a majority of the Supreme Court ruled that federal laws prohibiting discrimination by recipients of federal funds applied only to the particular program or activity receiving that financial assistance; Congress enacted legislation nullifying that decision, recounting in detail the legislative histories of the laws at issue, and concluding that "[c]ontrary to the view of the Supreme Court . . . Congress intended institution wide coverage."[20] *Atascadero State Hospital v. Scanlon*[21] held that monetary relief could not be obtained against a state for a violation of section 504 of the Rehabilitation Act; Congress promptly restored that remedy, the Senate conference report explaining, "The Supreme Court's decision misinterpreted congressional intent. Such a gap in Section 504 coverage was never intended."[22] When *Dellmuth v. Muth*[23] held that a state could not be sued for violating the Education of the Handicapped Act, Congress used virtually identical language[24] to explain the enactment of legislation authorizing such suits. The legislation overturning *Public Employees Retirement System v. Betts*[25] was accompanied by an exhaustive discussion of the legislative history of the Age Discrimination in Employment Act and concluded that *Betts* had interpreted that Act "incorrectly."[26]

Despite these repeated demonstrations of congressional dissatisfaction with the way it was interpreting federal statutes, a majority of the Supreme Court apparently did not get it, or did not

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15 S. REP. NO. 417, 97th Cong., 2d Sess. 17 (1982).

16 468 U.S. 992 (1984).

17 Handicapped Children's Protection Act of 1986, § 2, 100 Stat. 796 (1986) (codified at 20 U.S.C. § 1415(e)(4) (1988)).

18 S. REP. NO. 112, 99th Cong., 1st Sess. 2 (1985).

19 465 U.S. 555 (1984).

20 S. REP. NO. 64, 100th Cong., 1st Sess. 5 (1988).

21 473 U.S. 234 (1985).

22 S. REP. NO. 388, 99th Cong., 2d Sess. 27-28 (1986).

23 491 U.S. 223 (1989).

24 H.R. REP. NO. 544, 101st Cong., 2d Sess. 12 (1990) ("The Committee has determined that the Supreme Court misinterpreted congressional intent. Such a gap in coverage was never intended.")

25 492 U.S. 158 (1989).

26 S. REP. NO. 263, 101st Cong., 2d Sess. 17 (1990).

care.[27] By the time of the 1991 debates on the Civil Rights Act, congressional disapproval was increasingly directed at the Court itself. Particularly outspoken, Senator Chaffee, a member of the Senate Republican leadership,[28] stated, "In 1989 the Supreme Court handed down a series of decisions interpreting employment discrimination statutes in what might at best be described as a stingy, cramped manner. At worst the Court threw logic and precedent out the window."[29] On another occasion, Senator Chaffee asserted, "At worst, the Court took a 180-degree turn from what we in Congress over the years have tried to do. At best they took an unnecessarily severe interpretation of our intent."[30] Other speakers joined in criticizing the method of interpretation that had resulted in the decisions which the Civil Rights Act overturned. For example, Rep. Ford stated, "[The Act] makes right what the Supreme Court made wrong and sends a powerful message that the American people reject the Supreme Court's narrow and crabbed interpretation of civil rights laws generally and equal employment opportunity statutes specifically."[31] Similarly, Rep. Norton remarked, "[T]his began as an exercise to save the basic job discrimination statute from the Supreme Court . . . . A conservative court, presumably deferential to the legislative branch, departed from its own principles, usurped legislative intent, and rewrote [T]itle VII."[32] Rep. Goodling also criticized the Court, stating, "[T]he Supreme Court restricted Federal civil rights protections in a manner that was not consistent with the intent of Congress."[33] The Court's decisions were denounced as "wrongly

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27 Six months after Congress overwhelmingly approved legislation overturning the decision in *Patterson*, excoriating the majority opinion as a model of misinterpretation, Justice Thomas, in an opinion joined by Justice Scalia and Chief Justice Rehnquist, cited *Patterson* as a paradigm of interpretive methodology. Evans v. United States, 112 S. Ct. 1881, 1902 n.7 (1992) (dissenting opinion). Justice Thomas also bemoaned the failure of the majority to follow "the principles" of McNally v. United States, 483 U.S. 350 (1987), which itself had been overturned by Congress in 1988. *See* Anti-Drug Abuse Act of 1988, sec. 7603, 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346 (1988)).

28 Senator Chaffee subsequently lost his leadership position because of his support of the Civil Rights Act.

29 137 CONG. REC. S15470 (daily ed. Oct. 30, 1991).

30 137 CONG. REC. S7027 (daily ed. June 4, 1991).

31 137 CONG. REC. H9533 (daily ed. Nov. 7, 1991).

32 137 CONG. REC. H3952 (daily ed. June 5, 1991).

33 137 CONG. REC. H3900 (daily ed., June 4, 1991) (remarks of Rep. Goodling); *see also id.* at S7026 (daily ed. June 4, 1991) (remarks of Sen. Durenburger) ("All interested parties, including the administration, civil rights groups and business groups, agree that [*Patterson* and *Lorance*] incorrectly narrowed the protections available to minorities"); *id.* at H3848 (remarks of Rep. Martinez) ("[the act] clears up a Supreme Court misreading");

decided,"[34] "not consistent with the intent of Congress,"[35] and a "misinterpretation of U.S. civil rights law."[36]

For all participants in the ongoing judicial and academic debate regarding the most appropriate method of statutory construction, the action of Congress in enacting nine different statutes overturning as incorrect sixteen Supreme Court decisions interpreting civil rights statutes provides an invaluable reality check. The Supreme Court has repeatedly observed that "where . . . error is a matter of serious concern, . . . correction can be had by legislation."[37] From 1978 to 1991 serious errors in sixteen separate Supreme Court decisions[38] were corrected by legislation.[39] That pattern of legislative correction also demonstrated the existence of, and was a response to, a more fundamental error in the very method by which the Court had originally interpreted the statutes at issue.

The greatest importance of these nine corrective statutes is that they teach, by example, the proper methodology for interpreting statutes. The principles of statutory construction are too complex and subtle to embody in some statute, a sort of Uniform Statutory Construction Code, that could be mechanically applied. The fashioning and fine tuning of the proper methodology is very much a matter of experience, and no experience could be more relevant than a repeated and emphatic determination by the Congress that what the courts have been doing is seriously flawed. The evolution of substantive law involves a complex interaction between the legislative and judicial branches, each responding to the

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id. at H3875 (remarks of Rep. Gradison) ("In my view, the Court erred in its interpretation of the intent of Congress. I believe the Congress should move to correct the Court's decisions.").

34 137 CONG. REC. S15500 (daily ed. Oct. 30, 1991) (remarks of Sen. Danforth).

35 137 CONG. REC. H3900 (daily ed. June 4, 1991) (remarks of Rep. Goodling).

36 137 CONG. REC. S7026 (daily ed. June 4, 1991) (remarks of Sen. Durenberger).

37 Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986) (quoting Burnet v. Colorado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)); Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974) (also quoting *Burnet*).

38 In a number of instances a particular statute overturned several decisions which contained the same mistaken interpretation. For example, the holding in Grove City College v. Bell, 465 U.S. 555 (1984), overturned by the Civil Rights Restoration Act, had been reiterated in Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984).

39 In several instances the dissents had correctly anticipated that congressional action. West Virginia Univ. Hosps. v. Casey, 111 S. Ct. 1138, 1154-55 (1991) (Stevens, J., dissenting); Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 672 (1989) (Stevens, J., dissenting); United Air Lines, Inc. v. McMann, 434 U.S. 192, 218-19 (1977) (Marshall, J., dissenting).

actions and experiences of the other as new issues are faced and addressed. The methodology of statutory interpretation, as much as substantive law, should be shaped by that interaction between the two branches of government. Individual Justices may have philosophical views regarding statutory interpretation, but in the final analysis the Congress is, or at least ought to be, the master of statutory law.

This Article seeks to ascertain what lessons can and should be drawn from the action of Congress in adopting these nine corrective statutes. It suggests as its premise that the sixteen decisions overturned by Congress, although now just historic curiosities in the substantive law, are of unique importance for interpretive methodology because they embody the approach to statutory construction which Congress has so emphatically rejected.

The analysis which follows is thus in the nature of an autopsy of these disinterred decisions, seeking to determine what fatal defect was their undoing. It seeks, as well, to determine what rules of construction, if applied in these sixteen cases, would have yielded the interpretations which Congress has now indicated would have been the correct ones.

An analysis of this sort is surely essential to the proper interpretation of the 1991 Civil Rights Act and the other eight corrective statutes. No one but an incorrigible judicial recidivist would consider instead applying to these statutes the very defective interpretive methodology that the Congress condemned in enacting those corrective laws. The lessons to be learned from these nine statutes, and from the sixteen short-lived decisions they overturned, are not limited to the particular provisions misinterpreted and then amended, or to civil rights. Nothing in the action of Congress suggested it would have agreed with the sixteen decisions had they only dealt with some other subject. In the sixteen overturned opinions both the majorities and the dissenters purported to invoke interpretive principles of general application. The disputes in these cases regarding interpretive methodology routinely appear in non-civil rights cases, although the positions of particular Justices on these recurring issues certainly vary from case to case. Whatever was wrong with that methodology in these decisions would equally be error in interpreting a securities, trademark, tax, maritime, or social security statute.

I. "PLAIN LANGUAGE" AND FANCY CONSTRUCTION

In at least seven of the overturned decisions,[40] a majority of the Supreme Court insisted that its interpretation of the statute at issue was required by the obvious meaning of that law. In *Patterson*, for example, the majority maintained that its narrow construction of section 1981 was dictated by the "plain terms"[41] and "fair and natural reading"[42] of the law, compelled "as a matter of logic or semantics,"[43] and constituted the "plain and common sense meaning."[44] The majority further asserted that any broader reading of the law would be "tortuous" and "strain[ed] in an undue manner."[45] In *United Air Lines, Inc. v. McMann*,[46] the Court asserted that it had interpreted the ADEA in the manner required by the "plain" and "unambiguous" language of the statute.[47] The majority opinion in *Betts* repeatedly explained that its construction of the same law was mandated by the "plain statutory language."[48] *West Virginia University Hospitals v. Casey*[49] held that the "plain,"[50] "unambiguous,"[51] and "normal import of the text"[52] involved "demonstrates convincingly"[53] the correctness of the Court's interpretation. In *General Electric Company v. Gilbert*,[54] the majority asserted its interpretation was compelled by "the 'plain meaning' of the language used by Congress."[55] The Court insisted that a less restrictive view of the law would have required "ig-

40 In addition to the cases cited in the text, see EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1127, 1129 (1991) (application of Title VII abroad "lacks support in the plain language of the statute"); City of Mobile v. Bolden, 446 U.S. 55, 60 (1980) ("it is apparent that the language of §2" prohibits only practices with a discriminatory purpose).

41 Patterson v. McLean Credit Union, 491 U.S. 164, 176 (1989).

42 *Id.* at 185.

43 *Id.* at 177.

44 *Id.* at 185 n.6.

45 *Id.* at 181, 185.

46 434 U.S. 192 (1977).

47 *Id.* at 199, 201; *see also id.* at 203 (the Court uses "ordinary parlance" and "ordinary meaning").

48 Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 172 (1989).

49 111 S. Ct. 1138 (1991).

50 *Id.* at 1146.

51 *Id.* at 1147.

52 *Id.* at 1146.

53 *Id.* at 1141.

54 429 U.S. 125 (1976).

55 *Id.* at 145.

noring [the] language" at issue in *Grove City College v. Bell*[56] and "rewriting" the provision applied in *Martin v. Wilks*.[57]

Under the methodology invoked in these cases the principal significance of "plain meaning", as opposed to merely "likely," "apparent," or "probable meaning," was that a judicial finding of "plain meaning" triggered an exclusionary rule of considerable importance. Once a court found "plain" meaning, it was authorized, indeed required, to ignore all other circumstances that might otherwise bear on the interpretation of the law at issue. Thus in *Betts*, when the plaintiff employee sought to invoke the legislative history of the ADEA, the majority dismissed that history as simply irrelevant, stating, "In view of our interpretation of the plain statutory language . . . this reliance on legislative history is misplaced."[58] In most of the "plain language" cases, the majority simply ignored arguments regarding the legislative history of the statute involved.[59] Similarly, *Betts* held, the regulations promulgated by the agency charged with implementation of a statute are entitled to "no deference" if they are "at odds with the plain language of the statute itself."[60] This use of the plain language exclusionary rule was of considerable significance; in many of these cases the dissenters, relying on legislative history and established administrative interpretations, arrived at a contrary result.[61] The plain language cases premised the exclusion of all other considerations on an almost strident insistence that there was only one conceivable interpretation of the language in question. Thus in *Patterson*, the Court insisted that an interpretation of section 1981 less parsimonious than its own would be "tortuous," "strain[ed]," and "twist[ed]."[62] Elsewhere, Justice Scalia and Chief Justice Rehnquist have argued that interpretations with which they

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56 465 U.S. 555, 571 (1984).

57 490 U.S. 755, 767 (1989).

58 Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 172 (1989). *Betts* cited a similar passage in *McMann*. "[L]egislative history . . . by traditional canons of interpretation is irrelevant to an unambiguous statute." United Air Lines, Inc. v. McMann, 434 U.S. 192, 199 (1977).

59 *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

60 *Betts*, 492 U.S. at 171.

61 West Virginia Univ. Hosps. v. Casey, 111 S. Ct. 1138, 152-53 (1991) (legislative history); *Betts*, 492 U.S. at 189, 191 (legislative history); *id.* at 192-93 (administrative interpretation); *Patterson*, 491 U.S. at 206-07 (legislative history); Grove City College v. Bell, 465 U.S. 555, 583-92 (1984) (legislative history); *McMann*, 434 U.S. at 211-19 (legislative history); General Electric Co. v. Gilbert, 429 U.S. 125, 155-58 (1976) (administrative interpretation).

62 *Patterson*, 491 U.S. at 181, 183, 210.

disagreed "torture"[63] and were "butchering"[64] the statutory language, revealing a compassion for the mistreatment of words that they do not necessarily exhibit when faced with physical abuse of incarcerated human beings.[65]

In each of these cases, however, Congress has emphatically declared that the result arrived at by this methodology was mistaken. The lesson of the corrective legislation is that not only the holding in these cases, but their underlying methodology as well, were fatally flawed. The "plain language" cases, like the disasters at Gallipoli, Dieppe, and Dien Bien Phu, are important as illustrations of errors to be avoided in the future. In a number of instances, it is possible to ascertain why the majority's reading of the text was not only overconfident, but also wrong.

Most fundamentally, none of the interpretations proffered by the so-called plain language cases would be described, at least by a person speaking ordinary English, as "clear" or "plain" on the face of the statutory text. In the case of *Patterson*, for example, the statute confers on nonwhites "the same right . . . to make and enforce contracts . . . as whites."[66] Yet, the *Patterson* majority held that the "plain" meaning of the text prohibits: (1) discrimination in hiring, but not discrimination in transfers, layoffs or dismissals;[67] (2) hiring an individual with an intent to engage in racial harassment, but not racial harassment itself;[68] (3) discrimination in promotion to a position involving a "new and distinct relationship", but not in other promotions;[69] (4) the racé based refusal of a union to process a grievance, but not a race based decision by the employer to reject that grievance.[70] Whatever might be said for this exposition of the requirements of section 1981, no one would say that any of these distinctions were "plain" on the face of the statute.

The problem with these overturned cases was not that they misread the plain meaning of the statutory language at issue, but

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63 North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 541 (1982) (dissenting opinion).

64 American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2477 (1992) (Scalia, J., dissenting).

65 *See, e.g.*, Hudson v. McMillan, 112 S. Ct. 995, 1005 (1992) (Thomas, J., dissenting).

66 42 U.S.C. § 1981 (1988).

67 *Patterson*, 491 U.S. at 178-79.

68 *Id.*

69 *Id.*

70 *Id.* at 177.

that the meaning of the statutory language was not plain in the first place, and that any interpretation that purported to find such a plain meaning was thus a likely prescription for error. Although the routes taken by the majority to that error varied, the dissenting opinions in these cases consistently and correctly insisted that the terms of the laws simply were not clear enough to be dispositive.[71] Justice Marshall correctly observed in *Betts*, "only so much blood can be squeezed from the textual stone;"[72] even the majority opinion in *Betts* acknowledged that there comes a point at which a textual argument "requires us to read a great deal into the language."[73] It stretches credulity to suggest that Congress, if it actually considered and resolved some issue, would then have "decided it would drop coy hints but stop short of making its intention manifest."[74] In other circumstances, Justice Kennedy correctly observed that "[s]crutiny of the placement of commas will not, in the final analysis, yield a convincing answer."[75] The plain language cases use just such scholastic niceties to find meaning not readily apparent to others, including, presumably, to Congress.

By ordinary standards of clarity none of the statutes in the plain language cases was clear at all. If the phrase "plain meaning" is given its ordinary meaning, its absence is decisively demonstrated in most instances by the mere fact that the meaning of a statute is a matter of serious controversy. In most of the "plain language" cases the interpretation advocated by the majority was defiantly inconsistent with the manner in which the supposedly unambiguous language had been interpreted by numerous courts

71 *See, e.g.*, United Air Lines, Inc. v. McMann, 434 U.S. 192, 209 (1979) (Marshall, J. dissenting) ("In my view, the statutory language is susceptible of at least two interpretations").

72 Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 187 (1989) (dissenting opinion).

73 *Id.* at 173.

74 Dellmuth v. Muth, 491 U.S. 223, 230 (1989).

75 Evans v. United States, 112 S. Ct. 1881, 1892 (1992) (concurring opinion).

of appeals,[76] by federal agencies,[77] by Congress,[78] and even by earlier Supreme Court majorities, all of whom were entirely conversant in the English language. All such earlier authorities could conceivably be mistaken in a given case, and a reading of the statutory language might indeed help to reveal that error, but where the Court chooses to adopt an interpretation repeatedly rejected by others, it cannot plausibly assert that the language supporting its own conclusion is unambiguous.

It would indeed be surprising if many of the statutory interpretation cases decided by the Supreme Court did involve crystal clear statutory text. Genuinely unambiguous language is unlikely to give rise to the sort of dispute and intercircuit conflict which lead the Supreme Court to agree to hear a case. The volumes of U.S. Reports are in fact filled primarily with cases in which the Court was required to interpret statutes whose meaning, with regard to the question at issue, was not genuinely clear. Of course, there are with regard to any statute numerous conceivable questions of statutory meaning which Congress addressed specifically and clearly in language whose meaning is self-evident to all. But a litigant who questioned the meaning of genuinely unambiguous language (e.g. who argued Title VII does not apply to sex discrimination) would risk being subject to sanctions under Rule 11.

The legislative history of the 1991 Civil Rights Act illustrates some of the reasons why questions of statutory interpretation can and often do arise for which the statutory language in fact does not provide a plain and unambiguous answer.

First, it is utterly beyond the ability of Congress to foresee all, or perhaps even most, of the circumstances in which a proposed piece of legislation will be applied. To be sure, Congress ordinarily acts with some paradigm application in mind, with regard to which Congress has indeed made a decision as to what outcome the law should dictate. But under Title VII, as under most statutes, the courts are at times called upon to resolve an issue of statutory

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76 *Betts*, 492 U.S. at 182-3 (dissenting opinion) ("the majority casts aside the estimable wisdom of all five Courts of Appeal" to consider the issue); Martin v. Wilks, 490 U.S. 755, 762 (1985) (acknowledging "the great majority of the Federal Courts of Appeals" have adopted a contrary interpretation); Grove City College v. Bell, 465 U.S. 555, 590 (1984) (dissenting opinion) (citing appellate decisions); General Electric Co. v. Gilbert, 429 U.S. 125, 147 (1976) (dissenting opinion) (majority "rejects the unanimous conclusion of all six Courts of Appeals that have addressed this question").

77 *See supra* text accompanying note 61.

78 *See infra* text accompanying notes 263-66.

interpretation where "[t]here is no evidence that Congress gave the question . . . any thought at all."[79] Title VII applies to over 100 million employees working for several million employers, and has now been in effect for over a quarter of a century. The law has been and will continue to be invoked in countless circumstances Congress could never have anticipated—not because the circumstances are bizarre, but because Congress simply does not have the time to sit down and attempt to hypothesize every type of situation to which Title VII or any other law might apply.[80]

In 1990-1991, Congress became embroiled in an effort to do this with regard to a single provision of the Civil Rights Act, until all sides agreed that the task was inherently impossible. The 1989 decision in *Wards Cove Packing Co. v. Atonio*[81] had altered the definition of the "business necessity" required to justify a practice with an adverse impact on minorities or women. When Congress undertook to write a provision setting out a definition of business necessity, different factions within Congress and the Administration, as well as interested groups, attempted to anticipate the various types of employment practices to which the law could apply. An ongoing effort was then made to write into the specific terms of the bill the disposition of each such possible application. There were, on the whole, few disagreements about how particular hypothesized examples should be resolved. After a year of endless tinkering, however, Congress abandoned the task as impossible, in part because one side or another was always able to imagine yet another possible application that had not been addressed clearly, or in its view fairly, by the then current draft.[82]

Second, it often is not feasible to write into the terms of a statute the disposition even of all the questions which Congress has in fact considered. When it adopts a statute which it knows will be applied, for example, in a hundred different circumstances, it is often impracticable for Congress to frame a hundred section bill describing each such case and the agreed upon outcome. To be sure, Congress does in fact enact legislation of enormous

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79 Evans v. Jeff D., 475 U.S. 717, 743-44 (1986) (Brennan, J., dissenting).

80 *See, e.g.*, Two Pesos, Inc. v. Taco Cabana, Inc., 112 S. Ct. 2753 (1992) (concept and application of "trade dress" under Federal Trade Act); Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S. Ct. 2447 (1992) (various combinations of circumstances in which state might seek to impose tax on out of state corporation).

81 490 U.S. 642 (1989).

82 137 CONG. REC. S15239-01 (daily ed. Oct. 25, 1991) (Sen. Gorton); 137 CONG. REC. S15463 (daily ed. Oct. 30, 1991) (Sen. Kassenbaum).

length and specificity, of which the Internal Revenue Code is but one example. But at some point Congress must stop and look for general language which, although not pinpointing the outcome in every possible application, fits as well as words can the pattern of results which the Congress has in mind. In dealing with the definition of business necessity, for example, Congress generally agreed that it wished to codify the case law that existed prior to the *Wards Cove* decision. There were, however, several hundred pre-*Wards Cove* decisions utilizing a business necessity standard. Leaving aside the differences among those decisions, a year of unsuccessful legislative drafting demonstrated the impracticality of finding any manageable combination of words that encompassed with precision the specific holdings of all of those cases.

Third, much of the legislative drafting process is in a sense defensive. The first step, difficult in itself, is to find statutory language that at least fits the first paradigmatic case which Congress, or the sponsors, have in mind. What follows is a process of attempting to imagine other circumstances in which the law might be applied, and of assessing whether the language used might inadvertently lead to an unintended or counterproductive result. At the very end of congressional consideration of the 1991 Civil Rights Act, for example, after countless drafts and innumerable meetings, and following final agreement between the Administration and congressional supporters of the legislation, an unknown lawyer at the EEOC for the first time noticed that the agreed upon text (indeed, every previous draft as well) had been written in such a way as to imply that the EEOC , unlike private plaintiffs, could not seek damage awards on behalf of individuals injured by intentional discrimination.[83] A last minute letter called the attention of the Senate to the problem, and the bill was promptly amended by unanimous agreement. That problem could easily have been missed, however, just as other possibly unintended implications undoubtedly were not recognized by Congress in the wording of this and most other statutes. Precisely because it is impossible for Congress to anticipate all the questions that will ultimately arise regarding the meaning of a law, it is impossible for Congress to assure that the text of the law is free from unintended implications for some unanticipated circumstance. Thus, an

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83 137 CONG. REC. S15329-30 (daily ed. Oct. 29, 1991) (letter from Evan Kemp, Chairman of the EEOC); *id.* at S15362 (Sen. Kennedy).

undue emphasis on interpreting solely the language of a statute runs not only a risk of being a search for a nonexistent answer, but also a risk that the search will appear to find an answer that was quite the opposite of what Congress intended.

Given the inescapable, and understandable, ambiguity in the statutory language at issue in the plain language cases, it is at first blush difficult to understand how the majority could ever have asserted that language was actually quite unambiguous. Undoubtedly, reasonable people could disagree about the meaning of a statute, or any other written document, and faced with ambiguous language, could interpret it differently. It is not necessarily surprising that a majority of the Court, faced with such language, might on occasion interpret it incorrectly. But how could the Court, in making such an error, have repeatedly insisted that the meaning of the law was actually "plain"? And how could the majority have described as "unambiguous" language regarding the meaning of which other members of the Court obviously disagreed? In ordinary English a word or sentence about the meaning of which there is such a substantial dispute virtually by definition cannot be described as "plain" or "unambiguous."

The answer is that the majority opinions in these and other cases were not speaking ordinary English when they described the statutory language as plain and unambiguous. They emphatically were not asserting that any person of normal intelligence and fluent in the English language would readily recognize that the laws involved had the particular meaning endorsed by the Court. An ordinary reader would certainly not describe any of these interpretations as plain, obvious, or perhaps even explicable.

One would miss the significance of these decisions, and of the legislation overturning them, by simply dismissing the majority opinions—as did some members of Congress—as anti-civil rights.[84] As used by the majority in these cases, words like "plain" and "unambiguous" are terms of art. They refer to the result of a process of legal reasoning, a method (or several methods) of analysis which starts with the text of the statute and arrives at a particular meaning. Such statutes are asserted to be "clear" by analogy to the sense in which *Beowulf*, although unintelligible to modern readers, is plain and unambiguous to professors of Middle English.

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84 *See, e.g.*, 137 CONG. REC. H3876-01, (daily ed. June 4, 1991) (Rep. Owen); *id.* at H3851 (Rep. Conyers); *id.* at H3859 (Rep. Hughes); *id.* at H3865 (Rep. DeFazio); *id.* at H3866 (Rep. Kennedy); *id.* at H3889 (Rep. Collins); *id.* at H3853 (Rep. Hoyer).

What occurred in these cases, however, was not some sort of technical translation. There are some statutes—the Internal Revenue Code, for example—which are indeed written using technical terms or phrases well understood by the drafters, lawyers, and other experts, but quite opaque to anyone else. When a court interprets such statutes the process is indeed closely analogous to interpreting a foreign language, and a law meaningless to laymen might in fact be crystal clear to any law school graduate. But the statutes at issue in *Patterson, Betts, McMann,* and *West Virginia Hospitals* did not involve such technical terms, and even to attorneys the language at issue was not unambiguous—if by unambiguous we mean that virtually every lawyer would readily have agreed what those laws meant.

A variety of ideological and philosophical concerns have at times driven the Court to "find" plain meaning in statutory language which everyone else could see full well was unclear. It is perhaps part of the conceit of the law to believe that some principles of statutory construction, like a form of cryptography, can be used to detect meaning, even obvious meaning, in passages that confound others. Where no meaning indeed exists, however, the invocation of those principles gives a misleading appearance of serious analysis to a process that is essentially nonsensical. The manipulation of such rules to find "plain meaning" in opaque statutes is like using tarot cards to predict the future. The actual analyses in the plain language cases illustrate the inherent problems when the Court insists upon finding textual meaning where it may in fact not exist.

Patterson v. McLean Credit Union[85] demonstrates that unreliable results can follow if the Court insists on attaching excessive significance to a choice of terminology that Congress itself may never have regarded as significant. The statute at issue in *Patterson* prohibited racial discrimination in the "mak[ing] and enforc[ment]" of contracts.[86] As Justice Stevens noted in his dissenting opinion, the most literal interpretation of the law would have covered virtually all acts of employment discrimination.[87] The plaintiff in *Patterson,* like most American workers, had no written or oral contract for a fixed period of time, but was an at will employee. In an at will employment relation, every day is a

85 491 U.S. 164 (1989).
86 *Id.* at 170.
87 *Id.* at 219.

new contract, every promotion is thus necessarily a new contract, and a dismissal is not the revocation or violation of any existing contract, but a refusal by the employer to enter into further day to day contracts.[88]

The *Patterson* majority, however, concluded that section 1981 was largely inapplicable to an employment relationship after the employee was initially hired.[89] The linchpin of the majority's analysis was its very first sentence, asserting, "The most obvious feature of the provision is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforc[ement]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief."[90] The phrase "make and enforce" might plausibly have been read as all encompassing, covering whatever happened before or after the moment in time of entering into a contract. The majority did more than merely reject this reading; it identified as the single most important aspect of the statute the (purported) emphatic exclusion of something—whatever is not making and enforcement—from its coverage. From that premise all else followed. That every day is technically a new contract for an at will employee could not matter, because if it did, virtually the entire employment relationship would have been covered, and almost nothing would have been excluded. The vitality of the supposed "restriction" would be undermined if every promotion were treated as a new contract, even if the employee literally signed a new written contract on each such occasion; the majority therefore limited actionable promotions to those involving a "new and distinct relation."[91] Thus transformed, section 1981 protected not a right to enter into a contract, but only a right to enter into the first of a series of at will employment contracts and to enter into those promotional contracts that amount to a new and distinct relation. *Patterson* should be remembered as the classic example of the errors that follow if the Court insists on assuming that a possibly casual choice of words or punctuation must be freighted with enormous significance, without bothering to ask why Congress would have wanted to do so.

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88 *Id.* at 221.
89 *Id.* at 176.
90 *Id.*
91 *Id.* at 185.

West Virginia University Hospitals v. Casey[92] makes clear that the reliability of any precept of construction, even as fairly applied, must be tested against the realities of the legislative process. The issue in *West Virginia Hospitals* was whether the "attorney's fees" which may be awarded under section 1988 include the cost of expert witnesses. In holding that expert fees could not be awarded under section 1988, the Court stressed that in thirty-four other statutes, unlike section 1988, express provision had been made for an award of expert witness fees.[93] One such provision, the majority noted, had been enacted "just over a week prior to the enactment of § 1988 . . . [in] the Toxic Substances Control Act."[94] If "counsel fees" include expert fees, the Court argued, "dozens of statutes referring to the two separately become an inexplicable exercise in redundancy."[95] This analysis is certainly plausible, yet Congress promptly signaled that *West Virginia Hospitals* too was among the wrongly decided cases to be corrected.

The error here was in giving conclusive weight to this comparison of statutory language. The majority never exactly explained why it was dispositive of the construction of section 1988 that thirty-four *other* laws list counsel fees and expert fees separately. Had Congress enacted those provisions and section 1988 in a single thirty-five section law, those other provisions would be very instructive. But the opinion in *West Virginia Hospitals* does not suggest that Congress was actually aware of all or any of those other laws when it enacted section 1988. Justice Scalia's law clerks certainly deserve credit for having found those other statutes, but members of the House and Senate do not spend their days running every proposed statutory term and phrase through LEXIS, and it is unlikely that any member of either body had any idea how the words "counsel fees" and "expert fees" had been used in other statutes. The particular example emphasized by the Court, the Toxic Substances Control Act, illustrates the practical irrelevance of this sort of analysis. That Act, which encompasses forty-eight pages in Statutes at Large, was passed along with the amendment to section 1988 in the 1976 end of session rush of legislation.[96] It is exceedingly unlikely that any member of Congress, or

92 111 S. Ct. 1138 (1991).
93 *Id.* at 1142.
94 *Id.* at 1141.
95 *Id.* at 1143.
96 Within a week of the enactment, on October 19, 1976, of section 1988, Congress

any congressional staff worker, ever undertook a line by line comparison of these two bills, or of the scores of others on the floor, to look for similarities and differences in the way they had been drafted.[97]

Public Employees Retirement System v. Betts[98] makes clear that otherwise sensible principles of statutory construction are dangerously susceptible to manipulation and abuse. The problem in *Betts* was how to reconcile two provisions of the Age Discrimination in Employment Act.[99] Section 4(a)(1) forbids an employer "to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[100] Section 4(f)(2), on the other hand, provides that it is not unlawful for an employer "to observe the terms of . . . any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purpose of this chapter."[101] The majority, invoking the principle that no section of a statute should be construed in a way that renders it "nugatory,"[102] held that essentially all benefit plans were exempt from section 4(a)(1) because "*the* alternative interpretation would eviscerate § 4(f)(2)."[103] The palpable defect in this argument, as the dissent noted, was that there were a variety of possible alternatives to the majority's interpretation.[104] The only alternative considered by the majority—that all benefit plans which make any distinctions based on age would be outside the protection of section 4(f)(2) and thus unlawful—would indeed have nullified that section.[105] But the alternative construction long advocated by the EEOC, and ultimately codified in the stat-

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enacted a total of 90 statutes. *See* 90 Stat. 2498-2693 (1976).

97 Even the plausible argument that the § 1988 amendment and the Toxic Substances Control Act were enacted within a *week* of one another ignores congressional realities. The bills were actually considered on the floor of the House and Senate at more remote points in the legislative process. The Senate, for example, first approved the Toxic Substances Control Act on March 26, 1976, and passed the Civil Rights Attorney's Fees Awards Act on September 29, 1976, the day after it approved the conference report on the Toxic Substances Control Act. S. REP. NO. 698, 94th Cong., 2d Sess., 1976 U.S.C.C.A.N. 4491, 5908.

98 492 U.S. 158 (1989).

99 *Id.* at 161.

100 29 U.S.C. § 623(A)(1) (1988).

101 § 623(f)(2).

102 *Betts*, 492 U.S. at 177.

103 *Id.* (emphasis added).

104 *Id.* at 186-89 (dissenting opinion).

105 *Id.* at 177.

ute overturning *Betts*, had no such impact, protecting and permitting under section 4(f)(2) benefit plans making distinctions based on age where those distinctions are related to the higher cost of providing benefits to older workers. Conversely, the majority's view rendered the subterfuge clause of section 4(f)(2) meaningless by limiting it to circumstances so peculiar as unlikely ever to occur or to have been what Congress had in mind—such as the chimerical case in which an employer rewrites its entire benefit plan for the purpose of retaliating against a single employee for having filed an ADEA complaint.[106] In sum, application of the unexceptionable principle that a statutory provision should be construed to have some real meaning depends very much on what alternatives a court hypothesizes and how it evaluates them. This and other precepts of statutory construction are not objective mechanical rules; their application requires a considerable degree of judgment and thus is capable of abuse.

Finally, *United Air Lines, Inc. v. McMann*[107] demonstrates how misdirected cleverness can find in a statute a plain meaning Congress never intended. The statute at issue in *McMann* was the part of the ADEA, quoted above, regarding bona fide benefit plans. The majority in *McMann* concluded that section 4(f)(2) exempted from coverage by the ADEA all benefit plans adopted before the enactment of that law, even though an identical postenactment plan might be illegal.[108] Noting that section 4(f)(2) denied exemption to a plan that was "a subterfuge to evade the purposes of this [Act],"[109] the Court held that there could be no distinction between a subterfuge to evade the purposes of the law and a subterfuge to evade the law itself. The Court stated, "The distinction . . . is untenable because the Act is the vehicle by which its purposes are expressed and carried out; it is difficult to conceive of a subterfuge to evade the one which does not also evade the other."[110] Having thus transformed the language of the law from "subterfuge to evade the purpose of this [Act]' into "subterfuge to evade this Act", the rest of the analysis was easy. The Court continued, "So read, a plan established in 1941 . . . cannot be a sub-

106 *Id.* at 180. The dissenting opinion correctly described these applications as purely "hypothetical." *Id.* at 184 (Marshall, J., dissenting).

107 434 U.S. 192 (1977).

108 *Id.* at 203.

109 *Id.* at 192.

110 *Id.* at 198.

terfuge to evade an act passed 26 years later. To spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes, at the very least, a remarkable prescience to the employer."[111] It is not difficult to see the flaw in this analysis. "Evade the purpose of the Act" does not mean "evade the Act." It is true that a plan whose *purpose* was to evade the purpose of the Act would ordinarily have the *effect* of evading the Act itself, but that is not to say that the two types of evasive motive are identical. A 1941 plan denying medical benefits to anyone who was a grandparent would be a subterfuge to discriminate against older workers even though it would not have been adopted as a subterfuge to evade an as yet nonexistent law.

The action of Congress in overturning these decisions makes clear that it is important that courts not ignore other traditional sources for interpreting a statute merely because they may think the cold language of the statute itself "plain" or "unambiguous." Learned Hand repeatedly cautioned that there may be "no surer way to misread a document than to read it literally."[112] Yet, *McMann* suggests courts should consider legislative history only if they cannot find a dictionary to resolve the question.[113] Similarly, *Patterson* asserts that interpretation is a mere matter of "logic or semantics."[114] Justice Thomas has urged the courts to simply ask which alternative interpretation is most consistent with "correct grammar."[115] This is precisely the sort of deliberately uninformed approach criticized by Judge Hand a generation ago:

> All [legislators] have done is to write down certain words which they mean to apply generally to situations of that kind. To apply these literally may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to suppose they meant to provide for. Thus it is not enough for the judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was intended; which would contradict or leave unfulfilled its plain

111 *Id.* at 203.

112 Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (concurring opinion), *aff'd sub nom.* Gemsco, Inc. v. Walling, 324 U.S. 244 (1945).

113 *McMann*, 434 U.S. at 203.

114 Patterson v. McLean Credit Union, 491 U.S. 164, 177 (1989).

115 Evans v. United States, 112 S. Ct. 1881, 1900 (1992) (dissenting opinion).

purpose.[116]

A century ago the Supreme Court, citing a long line of federal, state, and English decisions, admonished that the courts should not blindly apply the literal language of a statute in circumstances where other circumstances demonstrate that the result could have been intended by Congress:

> It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the Reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.[117]

That the Court's "plain language" methodology has become consciously unrelated to the actual wishes of Congress is increasingly evident from the Court's opinions. In some passages the 1977 decision in *McMann* at least purported to be about congressional intent. The Court's proposed definition of "subterfuge" was followed by the comment, "we must assume Congress intended it in that sense."[118] After setting out its own narrow interpretation of the statute, the *McMann* majority opinion added, "we find nothing to indicate Congress intended" a broader reach of the law.[119] But the Court's more recent cases often lack even a pretense that Congress would have wanted the result reached by the majority. Rather, these decisions seem to describe a process in which Congress, quite possibly unaware of the significance of its actions, had chosen words which convey a special "plain language" meaning which the courts then decipher and apply. It is as though, to use a phrase coined by Justice Scalia in a noncivil rights case, Congress had inadvertently used in a statute the words of a "cleverly crafted code"[120] which only the Courts understood. On this view

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116 LEARNED HAND, HOW FAR IS A JUDGE FREE IN RENDERING A DECISION? *in* THE SPIRIT OF LIBERTY 103, 106 (Irving Dillard ed., 1952).

117 Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

118 *McMann*, 434 U.S. at 203.

119 *Id.* at 203.

120 American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2478 (1992) (dissenting opin-

the actual intent of Congress in using a particular term would be as irrelevant to the Court as was the intent of You Bet Your Life contestants who happened to utter "the magic word" to Groucho Marx. Thus in *Patterson*, the Court insisted that "our role is limited to interpreting what Congress . . . has done,"[121] not what Congress may have meant. In *West Virginia Hospitals* the Court held, not that Congress intended the counsel fee statute at issue not to encompass expert witnesses, but that counsel fees and witness fees simply "*are*" separate items.[122] The majority explained:

> Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law . . . . We do so not because that precise accommodative meaning is what the lawmakers must have had in mind . . . but because it is our role to make sense rather than nonsense out of the corpus juris.[123]

This passage suggests that congressional intent might henceforth be irrelevant even to "ambiguous" statutes, and that to ignore such intent the Court need only be able to find *some* meaning, not necessarily a clear or plain meaning, that fits "logically and comfortably" into the law. Elsewhere Justice Scalia has suggested "plain language" refers to the way in which words would be used by a legislator who understood "the agreed-upon methodology for creating and interpreting text."[124]

The Court's plain language cases have also been openly indifferent as to whether the results of that methodology made a great deal of sense. Where the meaning of the relevant statutory language was unambiguous, the majority insisted in *West Virginia University Hospitals*, it was simply irrelevant whether that interpretation advanced or frustrated the purpose of the statute.[125] The role of the Court was limited, *Patterson* explained, to ascertaining "what

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ion). In this case Justice Scalia was objecting to the use of prior cases to determine the meaning of words used in a later statute, precisely the methodology that Justice Scalia himself had embraced only a year earlier in West Virginia Univ. Hosps. v. Casey, 111 S. Ct. 1138, 1144 (1991).

121 Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989).

122 *Casey*, 111 S. Ct. at 1141 (emphasis added).

123 *Id.* at 1148.

124 Patterson v. Shumate, 112 S. Ct. 2242, 2250 (1992) (concurring opinion). Who agreed with whom upon such a methodology other than perhaps Justice Scalia and Justice Thomas, is unclear.

125 *Casey*, 111 S. Ct. at 1147.

Congress . . . has done"[126] through its choice of words; whether Congress might actually have intended the statute, and those words, to do was of no apparent significance. Thus, *Patterson* held that the 1866 Civil Rights Act required an employer to hire without regard to race, but permitted an employer to then harass, demote and dismiss employees on the basis of race.[127] It is quite difficult to imagine why any Congress would have intended such a bizarre and self-defeating system, which, according to the Court, expressly authorized employers to engage in practices that would effectively nullify the statute. In *Grove City College v. Bell*,[128] the Court, interpreting the Title IX prohibition against discrimination in federally assisted programs, held that a school which awarded federally funded scholarships could discriminate against the federal scholarship recipient—excluding her, for example, from all classes except cooking and dressmaking—but could not discriminate in awarding to other students scholarships from other sources.[129] Because of its statutory construction methodology, the majority saw no reason to explain why Congress would have wanted such a peculiar result.[130]

It is the very impossibility of an actual "plain language" interpretation of many statutes which may make that technique so alluring to some members of the Supreme Court. The task is often impossible in the sense that no objective form of analysis would yield any unambiguous answer, but that also means that no objective analysis constrains the majority when it purports to announce the plain meaning of a statute. Of course, if the plain meaning of the text were only one of several factors considered in statutory interpretation, this would not be so serious. But the Court has increasingly although erratically insisted not merely that plain meaning is the most important consideration, but that whenever plain meaning can be found the Court is forbidden to consider anything else. The use of plain meaning to preclude consideration of other factors—legislative history, the purpose of the law, the unfairness or irrationality of the result—is of decisive impor-

126 Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989).

127 *Id.*

128 465 U.S. 555 (1984).

129 *Id.* at 574-75.

130 *See also* Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2598 (1992) (Court's interpretation admittedly "stark," "troubling," "a trap for the unwary," and "a powerful tool to employers who resist liability under the Act," "[b]ut Congress has spoken with great clarity.").

tance. It assures that a finding of plain meaning, no matter how far fetched and marginal, is always dispositive because it never has to be assessed against any other consideration. Because all such considerations are automatically irrelevant, it simply does not matter whether the purported "plain meaning" serves no "plausible statutory purpose."[131] The result resembles nothing so much as a criminal trial in which evidence can be introduced only if the judge is unable to determine guilt or innocence by reading the morning's tea leaves. It is a system which confers on any majority the power to give any meaning it wishes to a statute, without having to pay any heed to the purposes or wishes of Congress. For a conservative Court constantly at odds with the policies of a more moderate Congress, such a scheme of judicial empowerment is of obvious allure.

The legislative history of the 1991 Civil Rights Act demonstrates yet another danger in the approach taken by the majority in cases like *Patterson*, a new problem that has arisen precisely because of the way the Court often attempts to find an answer in statutory language and thus deliberately ignore legislative history. Members of Congress have two ways to comprehend what they are voting for or against—a reading of the terms of the legislation itself, and reliance on the explanations of the legislation offered by its supporters and opponents, its legislative history. Under the approach to statutory interpretation advocated by Justice Scalia, and occasionally others, the terms of a statute may now be read to have a "plain meaning" that ordinary mortals—*e.g.*, members of the House and Senate—could not perceive, as a consequence of which the legislative history is then deemed irrelevant. This approach, as was noted above, often accords the Court virtually standardless discretion to give a statute virtually any meaning it pleases. Equally serious, it spawns legitimate fear of Trojan Horse legislation, ambiguous and benign sounding proposals which the proponents hope and intend a court will construe in a way that they realize full well Congress would never knowingly approve and which is therefore deliberately denied or at least obscured during the legislative process. Prior to the advent of the Scalia approach this could not easily have succeeded because a review of the legislative history and explanation of the bill would have led the Court to reject any such covert meaning. But now a proponent of such a proposal can mischaracterize it on the floor of the House or Sen-

131 *Id.* at 2602 (Blackmun, J., dissenting).

ate, confident that Justice Scalia and others—unlike members of those bodies—will ignore those representations.

The legislative history of the 1991 Civil Rights Act contains several illustrations of this problem. With regard to the statutory definition of business necessity, for example, proponents of the Administration bills insisted that they, like the supporters of the majority proposals, favored a return to the pre-*Wards Cove* definition of business necessity.[132] They denied charges that the Administration bills would have the effect, indeed had the purpose, of codifying the *Wards Cove* standard.[133] Subsequent developments confirmed that the Administration definition was in fact a Trojan Horse proposal to codify, rather than overturn, *Wards Cove.* Once compromise language was agreed upon, and further changes were impossible, Administration supporters openly proclaimed that codification of *Wards Cove* was in fact their goal, and announced their hope that the compromise text would be interpreted to have just such a result.[134] Conversely, although proponents of the earlier versions of the bill insisted they sought only to restore pre-*Wards Cove* law, conservatives expressed fears that the language of these versions, perhaps deliberately, went far beyond mere restoration.[135]

The so-called plain language approach followed in *Patterson* and similar cases would, in the final analysis, work a fundamental change in the constitutional allocation of power between the three branches of the federal government. As written, Article I of the U.S. Constitution provides that "[a]ll legislative powers . . . shall be vested in a Congress of the United States."[136] Increasingly, the Court has acted as if Article I said something like "all legislative powers, on any subject regarding which a statute has been adopted, shall be vested in the courts, unless that law has been

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132 137 CONG. REC. H3885 (daily ed. June 4, 1991) (Sen. Gunderson); *id.* at H3871 (Sen. Orton); *id.* at H3875 (Rep. Gradison); *id.* at H3903 (Rep. Franks); 137 CONG. REC. S3021-02 (daily ed. Mar. 12, 1991) (Sen. Dole); *id.* at S3026 (Dept. of Justice letter); *id.* at S3027 (Sen. McCain); 137 CONG. REC. S2260 (daily ed. Feb. 22, 1991) (Sen. Simpson).

133 137 CONG. REC. S8990 (daily ed. June 27, 1991) (Sen. Durenberger); 137 CONG. REC. H3851 (daily ed. June 4, 1991) (Rep. Conyers); *id.* at H3869 (Rep. Edwards); *id.* at H3888 (Rep. Towns).

134 137 CONG. REC. H9545 (daily ed. Nov. 11, 1991) (memorandum of Rep. Hyde); 137 CONG. REC. S15474 (daily ed. Oct. 30, 1991) (memorandum of Senator Dole).

135 *See, e.g.*, 137 CONG. REC. H3944 (daily ed. June 4, 1991) (statement by Rep. Stenholm); 137 CONG. REC. S2259 (daily ed. Feb. 22, 1991) (statement by Sen. Simpson); *id.* at H3930 (statement by Rep. Hyde); *id.* at H3932 (statement by Rep. Goodling).

136 U.S. CONST. art. 1, § 1.

written so clearly as to utterly preclude a particular judicial interpretation." For a conservative Supreme Court, at odds with the policies of a more moderate Congress and Executive, such a constitutional provision would be undeniable attractive, but it certainly is not what the framers, or the plain language of Article I itself, provided.

The first lesson of the corrective statutes is that the concept of "plain language" should be limited to what would be plain and unambiguous to an ordinary reader, such as above all, a member of Congress. Only a meaning that would have been obvious to an ordinary member of Congress—not law clerks who run a Lexis search on every word and phrase or who search for hidden meaning in the interstices and interrelationships of each clause—should be regarded as dispositive. Measured by this standard, very few cases coming before the Supreme Court will qualify. If lower court judges, executive branch agencies, or the Supreme Court's own prior opinions read or applied a law in a manner inconsistent with an asserted "plain meaning," that meaning simply cannot be characterized as plain, clear or unambiguous. A meaning not obvious to virtually all judges and agency officials cannot possibly have been obvious to the members of the House and Senate who enacted a statute.

II. PRESUMPTUOUS PRESUMPTIONS

Another group of overturned decisions was based on a different rationale for largely disregarding evidence of congressional intent. Here the methodology was almost the opposite of the plain meaning cases. These decisions begin by recognizing a strong presumption in favor of the result favored by the majority, and then profess to find that statute at issue insufficiently clear to overcome that presumption; in several instances the Court ruled congressional intent unclear only after expressly refusing to consider any evidence of intent contained in the relevant legislative history. In other instances the presumption created is so strong that most evidence of congressional intent could not be sufficient enough to overcome it. The same Justices who in cases such as *Patterson* easily discovered startling clarity in the least soupcon of textual nicety were, when invoking one of these presumptions, totally baffled as to the meaning of seemingly straightforward statutory language.

Two of these decisions, *Dellmuth v. Muth*[137] and *Atascadero State Hospital v. Scanlon*,[138] concerned the availability of monetary relief against a state agency. *Dellmuth* held that such relief could not be awarded under the Education of the Handicapped Act.[139] *Atascadero* reached the same conclusion regarding the Rehabilitation Act of 1973, which forbids recipients of federal funds from discriminating on the basis of disability.[140] Both cases relied on the Supreme Court's Eleventh Amendment decisions, which by the mid-1980's had established a presumption against the availability of monetary relief against a state agency. Although the reigning substantive interpretation of the Eleventh Amendment has itself been widely criticized, the presumption spawned by that interpretation has been of greater practical impact.

Atascadero explained that the presumption was rooted in a desire to remove all doubt about congressional intent: "[I]t is incumbent upon the federal courts to be *certain* of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress *unequivocally* express this intention in the statutory language ensures such certainty."[141] The Rehabilitation Act authorized monetary and other relief against "any recipient of Federal assistance",[142] but the Court held that this "general authorization," which of course literally included a state recipient, did not constitute the needed "unequivocal statutory language."[143] Congress overturned *Atascadero* within a year.[144]

Dellmuth established an even more stringent standard. The *Dellmuth* Court stated, "Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of the law, evidence of congressional intent must be both unequivocal and textual . . . . Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment."[145] The majority dismissed as irrelevant the fact

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137 491 U.S. 223 (1989).

138 473 U.S. 234 (1985).

139 20 U.S.C. § 1415(e)(2) (1988).

140 29 U.S.C. § 794 (1988).

141 *Atascadero*, 473 U.S. at 243 (emphasis added); *see also id.* at 242 ("unmistakably clear.").

142 29 U.S.C. § 794a (1988).

143 *Atascadero*, 473 U.S. at 246.

144 Rehabilitation Act Amendments of 1986, § 1003, 100 Stat. 1807 (1986) (codified as amended at 42 U.S.C. § 2000d-7(a) (1988)).

145 Dellmuth v. Muth, 491 U.S. 223, 230 (1989).

that in 1975, when the statute at issue had been enacted, Congress could not have known of the need for a special textual reference to state immunity, because the requirement had only been fashioned by the Court years later. "[T]he salient point," the majority explained, was "it cannot be said with perfect confidence"[146] that Congress intended to subject the states to suit. In the absence of such perfect confidence, a statute would be construed as not authorizing suits against a state even though the most plausible reading of the statutory language authorized just such suits. *Dellmuth* too was promptly set aside by Congress.[147] The presumption in *Atascadero* and *Dellmuth* is particularly harsh because it cannot be satisfied merely by demonstrating that a literal reading of the statutory text—e.g. "any" recipient—would encompass a state. The statutory language will be deemed sufficient, it appears, only if it specifically mentions the Eleventh Amendment, state sovereign immunity or lawsuits against states. These decisions at bottom, are not efforts to discern congressional intent, but an insistence that congressional intent is to be ignored, and thus frustrated, unless expressed in a particular way.

The Supreme Court decided *EEOC v. Arabian American Oil Co.*[148] (*"Aramco"*) by increasing the stringency of the presumption against extraterritorial application of federal laws. The question in *Aramco* was whether, as EEOC had long maintained, Title VII applied to the treatment of American citizens by American firms doing business abroad.[149] *Aramco* retains a patina of concern with congressional intent, asserting that its "canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained."[150] However, the test for discerning such an expressed congressional intent, *Aramco* held, was whether Congress had made "a clear statement" that the law applied overseas.[151] In other words, a semi-clear or middling or not-quite-decisive statement that a law does apply overseas has a perverse effect of com-

146 *Id.* at 231; *see also id.* ("unmistakable clarity" required"); *id.* at 232 ("unequivocal declaration").

147 Education of the Handicapped Act Amendments of 1990, sec. 103, § 604, 104 Stat. 1103, 1106 (1990) (codified as amended at 20 U.S.C.A. § 1403 (West Supp. 1993)).

148 111 S. Ct. 1227 (1991).

149 *Id.* at 1229.

150 *Id.* at 1230 (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

151 *Id.* at 1229.

pelling the conclusion that the unexpressed intent of Congress was precisely the opposite. Unlike the *Atascadero* and *Dellmuth* presumption, which would only be satisfied with certain magic words, *Aramco* does not require a particular linguistic formula. Rather, the *Aramco* presumption is usually conclusive because the evidence sufficient to overcome it must be especially weighty and compelling.[152] In *Aramco,* as in *Dellmuth,* legislative history was deemed inherently insufficient to overcome the presumption, a critical part of the decision in *Aramco* because the legislative history of Title VII was in fact quite clear on this point.[153] Having set a stringent standard of proof, and having excluded the dispositive evidence, the *Aramco* majority held EEOC had failed to establish that Congress intended to apply Title VII to American firms abroad.[154] *Aramco* was decided on March 26, 1991; legislation overturning that decision became law less than seven months later.[155]

Library of Congress v. Shaw[156] involved the longstanding presumption against a waiver of federal sovereign immunity. However, the statute at issue, the 1972 amendments to Title VII, indisputably *did* contain just such a waiver, providing that federal agencies could be held liable for back pay, costs, and counsel fees "the same as a private person."[157] In a Title VII award against a private person, counsel fees are adjusted upward to take into account the delay between when the legal services are rendered and when the defendant pays for them. The majority in *Shaw* held that such an upward adjustment was equivalent to an award of interest on the unadjusted fee and that a *separate* waiver of sovereign immunity was required as to interest awards. This additional waiver, the Court held in language reminiscent of *Dellmuth* and *Atascadero,* must be an "express" one.[158] Thus, the statute in *Shaw* was construed to provide that plaintiffs who sue the federal government

152 *Id.* at 1235 (considerations supporting extra territoriality "insufficiently weighty to overcome the presumption"); *see also id.* at 1236 (lack of "sufficient affirmative evidence" to overcome presumption).

153 *Id.* at 1239, 1241, 1244 (dissenting opinion).

154 *Id.* at 1236.

155 *Aramco* was overturned by § 109 of the 1991 Civil Rights Act, sec. 109, 105 Stat. 1071, 1077-78 (1991) (codified at 42 U.S.C. § 2000e-1 (Supp. 1992)).

156 478 U.S. 310 (1986).

157 42 U.S.C. § 2000e-5(k) (1988).

158 *Shaw,* 478 U.S. at 314, 315, 317, 318.

are to get smaller counsel fees, rather than fees that are "the same as" awards against private defendants.

Three other cases involved the application of seemingly ad hoc presumptions. In *United Air Lines, Inc. v. McMann*[159] the majority insisted that it would reject an interpretation of Title VII which raised questions about the validity of numerous existing benefit plans unless there was a "clear, unambiguous expression" of congressional intent.[160] In *West Virginia University Hospitals v. Casey*,[161] the Court, noting that a general law originally enacted in 1853 fixed the amount of witness fees at thirty dollars a day,[162] explained that it would "not lightly find"[163] that statutes adopted a century later, dealing with costs and fees in particular types of cases, had authorized expert fees in any greater amount. Larger fees could be awarded only if other statutes invoked were "explicit."[164] The majority in *Patterson v. McLean Credit Union*[165] explained "we should be and are 'reluctant to federalize' matters traditionally covered by state common law," such as racial harassment amounting to a breach of contract, and that it would not do so unless "Congress plainly directs."[166] These decisions do not purport to be based on any special interpretive principles governing employee benefit plans or expert witness fees; the presumptions were devised for, and apparently applied only in, *McMann*, *West Virginia Hospitals* and *Patterson* respectively.

The presumptions in these cases, especially *Atascadero*, *Dellmuth*, *Shaw* and *Aramco*, are particularly harsh. They establish a requirement of explicitness considerably more stringent than the degree of clarity relied on in the plain language cases. The literal meaning of the words "any recipient" in *Atascadero* and "same [remedies]" in *Shaw* was not sufficient to overcome the presumptions in those cases. The statutory language, *Atascadero* held, must be "unmistakably clear;"[167] mere "plain language" will not do. The sometimes complex process by which the plain language cases

159 434 U.S. 192 (1977).
160 *Id.* at 199.
161 111 S. Ct. 1138 (1991).
162 *See* Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 440-41 (1987).
163 *Casey*, 111 S. Ct. at 1141.
164 *Id.* (quoting *Crawford*, 482 U.S. at 439).
165 491 U.S. 164 (1989).
166 *Id.* at 183.
167 Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1989).

divined the meaning of statutory language is unacceptable here; as Justice Scalia observed in *Aramco*, "[m]ere implications from the statutory language" will not do.[168] Thus language so clear and unambiguous that in the plain language cases it would preclude consideration of legislative history and purpose is nonetheless insufficiently clear and unambiguous to overcome any of these presumptions. Absent the requisite degree of explicitness, the Court in a presumption case excludes from consideration even what it would otherwise describe as the "plain meaning" of the statutory language.

On other occasions where the Court has utilized a presumption to interpret statutes, it often invokes the presumption only after it has first exhausted all conceivable sources for ascertaining the intended meaning of the law.[169] But these overturned cases recognize an altogether different type of presumption, one which effectively precludes consideration of most of those sources.[170] Thus these presumption cases do not seriously purport to implement the actual intent of Congress. Rather, they establish rules—like the constitutional requirement of a majority vote in both houses—which must be met if Congress wishes to accomplish the result disfavored by the presumption. *Atascadero* admonishes, for example, that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only"[171] "when certain specific conditions are met."[172] Unless expressed through the special court prescribed terminology, *Library of Congress v. Shaw*[173] insisted, "an intent on the part if the framers of a statute . . . to permit the recovery of interest" is irrelevant.[174] Thus when the dissenters in *Shaw* and *Aramco* argued the majority opin-

168 EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1236 (1991) (concurring opinion).

169 *See, e.g.*, United States v. Thompson/Ctr. Arms, 112 S. Ct. 2102, 2109 (1992) (plurality opinion); *id.* at 2110 (concurring opinion); Evans v. United States, 112 S. Ct. 1881, 1893 (1992) (Kennedy, J., concurring); United States v. Burke, 112 S. Ct. 1867, 1878 (1992) (Souter, J., concurring).

170 *E.g.*, *Atascadero*, 473 U.S. at 238-39, 242.

171 *Id.* at 242.

172 *Id.* at 239.

173 478 U.S. 310 (1986).

174 *Id.* at 318 (quoting United States v. New York Runyon Importing Co., 329 U.S. 654, 659 (1947)).

ion overrode or ignored congressional intent, the majority opinions made no effort to deny the charge.

If the appropriateness of presumptions in statutory construction is measured by the accuracy with which they ascertain the intent of Congress, the lessons of the corrective legislation are easy to divine. The so-called Eleventh Amendment presumption should be abolished; tested by actual experience, that presumption has repeatedly resulted in inaccurate interpretations of federal law.[175] Elimination of that presumption would substantially reduce the impact of the Court's dubious construction of the Eleventh Amendment. The presumption against extraterritoriality should be ratcheted back from the harsh "clear statement" rule, and the presumption against waivers of sovereign immunity should not be applied on a remedy by remedy basis. No presumption should be so stringent that other statutory construction factors, such as legislative history, are deemed irrelevant or are inherently insufficient to overcome the presumption.

Above all, presumptions should only be used where there is a firm basis in congressional reality for assuming that Congress would likely favor or disfavor a particular result. It will not do to say, as did some of the overturned cases, that any court created presumption is reliable because Congress must have known it existed. In that sense one could argue that a presumption against applying criminal statutes to Republican office holders would be reliable once formally announced by the courts. Nothing in the history of these overturned decisions indicates that Congress spends its time pursuing United States Reports or *Sutherland on Statutory Construction* in search of presumptions to memorize. Judicially created presumptions are increasingly a trap for an unwary and preoccupied Congress; they merely complicate an already difficult legislative drafting process.

Judicial creation of *new* presumptions intrudes even more seriously into the domains of Congress and produces results particularly likely to be overturned. Justice Marshall's dissenting opinion

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175 In addition to *Atascadero* and *Dellmuth*, Congress overturned the decision in Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973), which had held that monetary relief was not available against state agencies for violations of the Fair Labor Standards Act. Fair Labor Standards Amendments of 1974, § 6, 88 Stat. 55, 58-59 (1974) (codified as amended at 29 U.S.C. § 203(d), (e) (1988)).

in *Aramco* explained how the presumption announced and invoked by the majority departed from past principles of construction.[176] Responding to a similar objection in *Dellmuth*, the majority in that case argued the Ninety-fourth Congress had enacted the Education of the Handicapped Act after "taking careful stock of the state of Eleventh Amendment law."[177] But the EHA was enacted in 1975, a full decade *before* the presumption at issue was created in *Atascadero*. The adoption of such new presumptions changes, quite literally, the meaning of pre-existing laws. Thus the 1976 Copyright Act, construed as fully applicable to the states prior to *Atascadero*, was thereafter reinterpreted to immunize state agencies from copyright infringement actions, requiring Congress to reenact the statute to restore its original meaning.[178] The power to create intent-overriding presumptions is the power to rewrite any statute at will.

The danger of abuse is starkly illustrated by the Court's recent decisions regarding whether federal laws pre-empt state statutes; over the course of three decisions in six days the Court, and most of its members, changed positions as to whether to apply a presumption against pre-emption.

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176 EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1237-39 (1991).

177 Dellmuth v. Muth, 491 U.S. 223, 230 (1989); *see id.* at 195; *see also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 255 n.7 (dissenting opinion) ("When Congress enacted § 504, it could have had no idea that it must obey the extreme clear-statement rule adopted by the Court for the first time today.").

178 This history is set out in H.R. REP. NO. 282, 101st Cong, 1st Sess. 2 (1989). The Report in part states:

> The legislative history of the Act makes it absolutely clear that in 1976, Congress intended to make states fully liable for copyright infringement and subject to all copyright remedies.
>
> [T]he Register of Copyrights, stated that:
>
> . . . No one suggested that the states were already immune from liability to damages under the Eleventh Amendment. No state official requested total exemption from copyright liability.
>
> . . . .
>
> Congressional intent to abrogate State sovereign immunity . . . was clear to all interested parties at the time the Act was negotiated and enacted . . . . Obviously, however, at the time the Act was enacted, the Congress did not have the benefit of the Court's subsequent decisions . . . .
>
> Despite the intent of Congress, . . . the Act appears insufficient to meet the Supreme Court's test set forth in *Atascadero* . . . .

Id. at 5-6.

Utilization of a Presumption Against Pre-Emption

Justice	Gade v. National Solid Waste Management Ass'n[179]	Wisconsin Dept. of Revenue v. Wrigley Co.[180]	Cipollone v. Liggett Group, Inc.[181]
Souter	Yes	No	Yes
Stevens	Yes	No	Yes
Thomas	Yes	No	No
Kennedy	No	—	Yes
Rehnquist	No	—	No
O'Connor	No	—	Yes
White	No	No	Yes
Blackmun	Yes	—	Yes
Scalia	No	No	No

The Supreme Court has suggested that at least some presumptions have a rationale avowedly unrelated to ascertaining the actual meaning of a statute. Certain presumptions appear in effect to be judicial presumptions against types of legislation or applications adopted simply because the courts regard them as inherently undesirable. Thus in *Hutto v. Finney*,[182] Justice Powell urged the adoption of the rule later applied in *Atascadero* and *Dellmuth* on the ground that:

> [b]y making a law unenforceable against the states unless a contrary intent were apparent *in the language of the statute*, the clear statement rule . . . ensure[s] that attempts to limit state power [are] unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interests.[183]

In an amicus brief in *Atascadero*, nine members of Congress rightly objected that a presumption adopted for the purpose of impeding

179 112 S. Ct. 2374 (1992).
180 112 S. Ct. 2447 (1992).
181 112 S. Ct. 2608 (1992).
182 437 U.S. 678 (1978).
183 *Id.* at 760 n.4 (quoting Lawrence Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 695 (1976) (emphasis added)).

legislation disagreeable to the courts would violate the separation of powers:

> On this view requiring that legislation contain a special reference to lawsuits against states is deemed desirable because it maximizes the likelihood that the legislation will be defeated. The structuring of the legislative process, however, is an internal matter to be regulated by the House and Senate, not by the courts. Whether to require, permit, or curtail congressional discussion of a particular topic is a decision which Article I entrusts to the legislative branch.[184]

But the *Atascadero* majority promulgated its presumption as a method of effectuating what the majority thought was the proper "constitutional balance between the Federal Government and the States."[185] The presumption in *Shaw* was intended to accord federal defendants a "favored position."[186] The *Aramco* presumption was framed to avoid "international discord"[187] which might follow if federal law forbade invidious discrimination by an American firm doing business in a country whose laws mandated that form of abuse. In *Evans v. United States*,[188] Justices Thomas and Scalia and Chief Justice Rehnquist proposed yet another presumption, this one against applying federal law to extortion by state officials, explaining that federal prosecution of such corrupt officials was "repugnant . . . to the basic tenets of federalism."[189] Members of the Court are entitled to adhere to whatever views they please regarding federalism, foreign policy, or political corruption, but when they fashion virtually irrebuttable presumptions to incorporate those views into federal statutes they surely intrude upon the law-making function entrusted by Article I to Congress, not the judiciary.

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184 Brief Amicus Curiae In Support of Respondent on Behalf of Senator Alan Cranston, et al. at 46-47, Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (No. 84-351).

185 *Atascadero*, 473 U.S. at 238. The dissenting opinion, recalling Justice Powell's original argument, properly described the presumptions as "designed as hurdles to keep disfavored suits out of the federal court." *Id.* at 254.

186 Library of Congress v. Shaw, 478 U.S. 310, 315-16 (1986) (quoting United States v. Verdier, 164 U.S. 213, 219 (1896)).

187 EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1230 (1991).

188 112 S. Ct. 1881 (1992).

189 *Id.* at 1900 (dissenting opinion).

III. CONJURED PROBLEMS AND VAMPIRE ARGUMENTS

Another group of cases did go beyond the language of the statute to deal with possible purposes of the legislation, but erred because the purposes relied on were those, not of the supporters of the law, but of actual or potential opponents. In one recent case, the Department of Justice actually went so far as to urge the Court to treat as definitive the minority views of Senators who had opposed the statute at issue.[190] The defect in these overturned cases is somewhat more subtle. In each, the statute was construed to solve or avoid a problem, but the problem of controlling importance was not invidious discrimination, but some hypothetical collateral difficulty that might be caused by enactment or enforcement of the anti-discrimination legislation itself.

In *Wards Cove*,[191] for example, the majority justified its rewriting of disparate impact principles as necessary to assure that enforcement of those principles did not coerce employers into adopting quotas.[192] The *Patterson* Court explained that a very narrow reading of section 1981 was needed to avoid the nullification of the Title VII administrative processes that would occur if plaintiffs had a choice of utilizing those procedures or proceeding directly to court under section 1981.[193] *Price Waterhouse*, out of concern that the law not interfere unduly with the prerogatives of employers, declared that a supervisor who dismissed a subordinate on account of race or sex did not violate the law if the supervisor would also have taken the same action on some other lawful ground.[194] *Lorance* held that protection of the expectations of the beneficiaries of an unlawful seniority system required that chal-

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190 Thornburg v. Gingles, 478 U.S. 30, 44 n.7 (1986).

191 Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

192 After describing the circuit court's method of analyzing the statistical evidence in the case, the Court asserted, "Such a result cannot be squared with . . . the goals behind the statute. The Court of Appeals' theory, at the very least, would mean . . . . [t]he only practicable option for many employers would be to adopt racial quotas." *Id.* at 652; *see also id.* at 659; Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 993-94 (1988). Justice Stevens, in his dissenting opinion in *Wards Cove*, described the goal of Title VII, not as quota avoidance, but as "eliminating barriers that define economic opportunity not by aptitude and ability but by race." *Wards Cove*, 487 U.S. at 662.

193 *Patterson*, 491 U.S. at 173-74 (availability of § 1981 suits frustrates the objectives of Title VII); *id.* at 181 (where § 1981 suit available, "the detailed procedures of Title VII are rendered a dead letter;" restriction on § 1981 suits will "preserve the integrity of Title VII's procedures"); *cf.* Smith v. Robinson, 468 U.S. 992, 1009-13 (1984).

194 *Price Waterhouse*, 490 U.S. at 242 (invoking "[t]he statute's maintenance of employer prerogatives").

lenges to such systems be brought long before they were ever applied, or before the future victims had even been hired.[195] *Betts*[196] and *McMann*[197] concluded that the ADEA should be interpreted to largely exempt benefit plans from coverage because the alternative would disrupt an unduly large number of such plans.[198]

Of course, all of these decisions were overturned by Congress. In retrospect, at least, their common flaw was that the arguments and objections to which the Court attached controlling importance were precisely the arguments and objections which Congress had rejected in whole or part when it originally passed the laws at issue. The argument that Congress should not interfere with the prerogatives of employers, the guiding principle of *Price Waterhouse*, was of course a central argument in 1964 against enactment of Title VII. The argument in *Patterson*, that overlapping coverage of Title VII and section 1981 would cause administrative problems, had in fact been the basis in 1972 of an unsuccessful proposal to amend Title VII to make it the exclusive remedy for employment discrimination.[199] It would have been surprising indeed if Congress had accepted these contentions in 1990 and 1991, when it had squarely rejected them once before.

In other instances, arguments raised in opposition to the initial draft of legislation had been addressed by the inclusion of specific language responding, to the extent the proponents were willing to do so, to those professed objections. The critical defect of *Wards Cove*, *Lorance*, *Betts*, and *McMann* was their failure to understand that those modifications of the legislation at issue reflected a very deliberate decision by Congress to go only so far toward

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195 *Lorance*, 490 U.S. at 912 (permitting challenges to invidiously motivated seniority rules would be unfair to "those who work—perhaps for many years—in reliance upon the validity of a facially lawful seniority system" and "disrupt those valid reliance interests;" female plaintiff "could defeat the settled (and worked for) expectations of her co-workers").

196 *Betts*, 492 U.S. at 177 (broader reading of ADEA would invalidate most post-Act benefit plans that discriminate against older workers).

197 *McMann*, 434 U.S. at 203 (broader reading of ADEA would result in "wholesale invalidation of retirement plans instituted in good faith before its passage").

198 Similarly, in *Robinson*, the Court theorized that Congress in adopting the Education of the Handicapped Act ("EHA"), which required the states to provide effective educational services to some 8 million handicapped children, *Robinson*, 468 U.S. at 1009, decided to deny counsel fees to plaintiffs suing to enforce the EHA because of "the financial burden already imposed on States by the responsibility of providing education for handicapped children." *Id.* at 1020.

199 *Patterson*, 491 U.S. at 202-04 (Brennan, J., dissenting).

accommodating the arguments of opponents as the specific language clearly indicated. Limiting amendments of the sort at issue in these cases should be carefully and narrowly construed precisely because they do tend to limit the extent to which the legislation achieves its underlying purpose. Another reason for narrow construction is that Congress is unlikely to have intended to incorporate a limitation not clear on the face of the amendment itself. That is especially true where the argument to which the amendment responds, if accepted without reservation, might well eviscerate the entire law.

Wards Cove is a classic example of this situation. A central and repeated argument against passage of Title VII was that it would coerce employers into adopting quotas; a somewhat nominal provision was added to Title VII in response. But the members of Congress who attached primary importance to avoiding quotas, or professed to do so, voted against passage of the law. Resurrection of avoidance of quotas as the controlling principle of Title VII interpretation is a perversion of the priorities of the Congress that enacted the law. Because *every* application of Title VII can be alleged to entail some such risk—or at least opponents so argued in 1963 and 1964—there is no application of the law that could not be deemed inappropriate under this principle of interpretation.

Section 703(h) was added to Title VII in response to organized labor's concerns about the impact of the law on seniority systems. Of course, the best way to protect seniority systems from Title VII would have been to exempt them entirely from coverage by the statute. But that is not the course chosen by Congress; rather, a carefully framed and limited amendment was drafted that declared certain systems lawful, while others remained forbidden. *Lorance* went beyond this compromise by reading into Title VII a special statute of limitations applicable to the very systems that remained *un*lawful, and which section 703(h) did not exempt, a limitations rule which made challenges to many of those systems a practical impossibility. Of course, Congress in 1964 might have chosen to accord an express exemption to a larger group of seniority systems, or to provide the sort of practical exemption conferred by *Lorance,* but Congress clearly made a deliberate decision not to go that far. *Betts* and *McMann* erred because they treated as a complete exemption from the ADEA a limiting amendment designed only to protect cost justified age distinctions in benefit plans.

All of these decisions failed because they lost sight of the actual purpose which had led Congress to enact the statutes at issue in the first place. To read these opinions, one might conclude that Title VII was adopted to stop quotas, protect management prerogatives, and immunize invidiously motivated seniority systems from legal attack, and that the ADEA was enacted to endorse benefit plans that discriminated against older workers. These decisions are virtually devoid of consideration of whether the proposed statutory interpretation would facilitate or interfere with the eradication of invidious discrimination. Objections decisively rejected by Congress returned from the legislative grave, a species of vampire argument, to control the interpretation of the very laws they attacked in vain when on the floor of the House and Senate. Fanciful "plain language" interpretations have at least some chance of being correct, if only inadvertently; but interpretations based on such resurrected objections are almost certain to be disapproved by Congress.

Statutory construction based on problems hypothesized to follow from an unfettered implementation of the underlying statutory purpose, here the elimination of discrimination, is fraught with other difficulties as well. First, the courts are not particularly well equipped to evaluate what would and would not amount to a serious practical problem, on the job or in the administration of the law. A majority of the Supreme Court in *Patterson*, for example, insisted there would be grave difficulties if discrimination victims were accorded remedies under both Title VII and section 1981. When that issue was before Congress in 1990 and 1991, however, not a soul could be found among the legions of conservative and business opponents of the Civil Rights Act, or at the EEOC (which also opposed other aspects of the legislation) who would either defend the decision in *Patterson* or suggest that overlapping remedies were the source of any difficulty. Unlike 1972, no amendment was even offered in 1990 and 1991 to eliminate those overlapping remedies. Congress was unwilling to require all employment discrimination victims to go through the Title VII administrative process because, *inter alia*, Congress knew from experience, as the Supreme Court apparently did not, that that process had often proved to be ineffective. Similarly, the *Patterson* majority apparently believed its narrowing of section 1981 would not "sacrific[e] any significant coverage of the civil rights

laws."[200] Congress overturned *Patterson*, in part, because the Court was clearly mistaken. The committee reports on the 1991 Civil Rights Act stressed that *Patterson* had the effect of removing all coverage for employees at 3.7 million firms with less than fifteen workers, and of eliminating any effective monetary remedy for racial harassment by any employer.[201]

An interpretive methodology grounded on the avoidance of such hypothetical problems also has considerable potential for abuse. In *Wards Cove*, a conservative majority suggested that quotas would result if, in analyzing the disparate impact of an employer's actions, several different practices were combined and evaluated together.[202] However, only seven years earlier in *Connecticut v. Teal*,[203] several of those same conservatives, then in the minority, had insisted with equal certainty that quotas would surely result *unless* multiple practices were in fact treated in combination by the courts.[204] Obviously, both of these contentions could not have been correct; in reality neither was. But a comparison of *Wards Cove* and *Teal* demonstrate how easily these sorts of difficulties can be conjured up to justify any desired statutory interpretation.

Reliance on objections advanced in opposition to a statute, even where those objections led to some responsive amendment, or to statements by proponents that the legislation would not have the feared effect, is imprudent for another, potentially more vexsome, reason. In some instances, the objection itself may have been a political ruse, and the response an equally political bit of public posturing, all in a process which no participant in the process took at face value. The 1964 debates regarding Title VII are a classic example of this situation. Opponents of the legislation objected at great length that it would lead to quotas, and an amendment was added in response. To this day, the Supreme Court takes all this at face value. In reality, however, most of these opponents did not object to Title VII because they were against quotas; they voted against the bill because they favored racial

200 *Id.* at 181-82.

201 S. REP. NO. 315, 101st Cong., 2d Sess. 12 (1990); H.R. REP. NO. 644, 101st Cong., 2d Sess., pt. 1, at 18 (1990).

202 *Wards Cove*, 490 U.S. at 657. The passage from *Watson* cited by the *Wards Cove* majority is even more emphatic about this danger. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988) (employers would be liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their workforces.").

203 457 U.S. 440 (1982).

204 *Id.* at 458-60 (dissenting opinion).

discrimination against blacks. The reigning social system most of the opponents of the 1964 Civil Rights Act wanted to preserve was not some Anti-Defamation League-inspired color blind society, but pervasive, blatant, malicious bigotry.

The legislative history of the 1991 Civil Rights Act involved a number of such charades. With the exception of a handful of inside-the-Beltway ideologues, none of the major opponents of the bills which passed the House and Senate actually believed they would lead to quotas, or even cared about the quota issue except as a public relations device. For the business community and their congressional supporters—and the business community was the critical force in sustaining President Bush's 1990 veto—the controlling concern was how to prevent an amendment that would have allowed juries to award compensatory and punitive damages in sex discrimination cases. Members of both parties acknowledged at the end of the eighteen month battle that this had been the real dispute at issue from the outset.[205] Prior to *Patterson*, of course, such damages had long been available in race discrimination cases, but few blacks sit on federal juries outside a handful of major cities, and actual awards were modest. As an article in the *Wall Street Journal* alerted business readers shortly after the final compromise was struck,[206] the availability of jury trials and damages under Title VII sex discrimination cases was the major innovation of concern to employers that was wrought by the legislation. However, little, if any, of this would be apparent to a judge reading the congressional debates.

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205 137 CONG. REC. S15338 (daily ed. Oct. 29, 1991) (Sen. Jeffords); *id.* at S15378 (Sen. Nickles); *id.* at S15383 (Sen. Jeffords); *id.* at S15445 (Sen. Robb).

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> Forget the hysteria over racial quotas. As the White House-approved civil rights comprise heads for likely passage this week, the greatest impact for business will be an increase in the costs of lawsuits brought by women . . . who successfully sue for deliberate job discrimination.
>
> . . . [O]nce the deal was struck, quotas proved a phony divide. If the bill clears Congress and is signed by the president, as expected, business will have to contend less with any real or imagined quotas than with a likely increase in lawsuits from women alleging deliberate sex-based employment discrimination, including sexual harassment. . . .
>
> . . . .
>
> Now that the White House has resolved the quota issue, even the bill's most vociferous opponents are conceding that the charge was a distraction.

Timothy Noah, *Lawsuits by Women, Disabled Are Likely to be the Main Result of Comprise Civil Rights Bill*, WALL ST. J., Oct. 28, 1991, at A18.

Thus, the third overall lesson of the corrective legislation is that a court is likely to misconstrue a statute if it attaches controlling importance to avoiding "problems" that might be caused by implementation of the law, rather than to solving the problem which led Congress to enact the statute in the first place.

IV. THE PRIMACY OF PURPOSE

The methodology most often advanced by the dissenting opinions in these cases was to identify the general purpose of the legislation at issue and then to interpret the law in the manner which best advanced that purpose. That was the approach to statutory construction which prevailed in the nineteenth century, when the Supreme Court admonished that "the cause and necessity of making the law," consideration of "the evil it is designed to remedy," "must limit and control the literal import of the terms and phrases employed."[207] The recent majority opinions overturned by Congress, however, usually, at times self-consciously, ignored the overall goal of the provision in question. In some instances, the majority argued that legislative purpose was irrelevant or that it simply did not exist in any legally relevant sense.

In *General Electric Co. v. Gilbert*,[208] Justices Brennan and Marshall argued that the question presented should be evaluated "in terms of the broad social objectives promoted by Title VII,"[209] and concluded that "pregnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force."[210] In *Grove City College v. Bell*,[211] Justices Brennan and Marshall insisted that the majority "ignores the primary purposes for which Congress enacted Title IX," emphasizing "the primary congressional purpose behind the statute was 'to avoid the use of federal resources to support discriminatory practices.'"[212] In *Library of Congress v. Shaw*,[213] Brennan and Marshall, now joined by Justice Stevens, maintained that "[t]he 'underlying congressional policy'" behind that statute was "that federal employees enjoy the

207 Church of Holy Trinity v. United States, 143 U.S. 457, 459, 460, 463 (1892).
208 429 U.S. 125 (1976).
209 *Id.* at 148.
210 *Id.* at 158.
211 465 U.S. 555 (1984).
212 *Id.* at 582 (quoting Canon v. University of Chicago, 441 U.S. 677, 704 (1979)).
213 478 U.S. 310 (1986).

same access to courts and the same judicial remedies that are available to other Title VII plaintiffs."[214] They criticized the majority for a result which "frustrates the intention of Congress that federal employees enjoy the same rights and remedies in the courts as do the individuals in the private sector."[215]

In the 1989 cases, the dissents repeatedly emphasized the importance of congressional purpose and chastised the majority for thwarting the achievement of those goals. The *Patterson* dissent objected that the majority's interpretation of section 1981 was "antithetical to Congress' vision of a society in which contractual opportunities are equal."[216] In *Wards Cove*, the dissenters argued the Court had turned "a blind eye to the . . . purpose of Title VII,"[217] and abandoned an earlier interpretation of the law which had promoted "our national goal of eliminating barriers that define economic opportunity not by aptitude and ability but by race."[218] In *Lorance*, Justices Marshall, Brennan, and Blackmun argued: "Viewing each application of a discriminatory system as a new violation serves the equal opportunity goals of Title VII by ensuring that victims of discrimination are not prevented from having their day in court."[219] The majority decision, they insisted, was "glaringly at odds with the purposes of Title VII."[220] Senator Dole later commented that the holding in *Lorance* "fails to protect sufficiently the important interest in eliminating employment discrimination that is embodied in Title VII."[221] In *Betts*, Marshall and Brennan complained that the Court's interpretation was "antithetical to the ADEA's goal of eradicating baseless discrimination against older workers."[222]

In *West Virginia University Hospitals, Inc. v. Casey*,[223] Justice Stevens, who had voted with the majority in *Lorance* and *Betts*, wrote a dissenting opinion emphasizing the general importance of congressional purpose:

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214 *Id.* at 325.
215 *Id.*
216 *Patterson*, 491 U.S. at 189.
217 *Wards Cove*, 490 U.S. at 663.
218 *Id.* at 662.
219 *Lorance*, 490 U.S. at 915.
220 *Id.* at 914; *see also id.* at 915 ("flouting the intent of Congress").
221 137 CONG. REC. S3025 (daily ed. Mar. 12, 1991).
222 *Betts*, 492 U.S. at 183.
223 111 S. Ct. 1138 (1991).

> In recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation. Thus, for example, in *Christiansburg Garment Co. v. EEOC*, [the] . . . holding rested entirely on our evaluation of the relevant congressional policy and found no support within the four corners of the statutory text. Nevertheless, the holding was unanimous and, to the best of my knowledge, evoked no adverse criticism or response in Congress.
>
> On those occasions, however, when the Court has put on its thick grammarian's spectacles and ignored the available evidence of congressional purpose . . . the congressional response has been dramatically different . . . .
>
> [W]e do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it . . . to restate its purpose in more precise English.[224]

The controlling congressional purpose in *West Virginia University Hospitals*, Justice Stevens argued, was to provide effective access to the judicial process.

Most often, the majority opinions in these cases are simply devoid of any discussion of congressional purpose or of why Congress might have wanted the particular result arrived at by the Court. Thus, when the dissents criticized the crazy-quilt result in *Patterson* as "aimless" and "askew"[225] and the outcome in *Lorance* as "bizarre,"[226] the majority did not bother to respond because it apparently saw no need to fit its conclusion into any overall statutory purpose. In *Betts*, the majority proposed a circular argument for addressing the issue of congressional purpose. The "purpose" of a law was to do whatever the Court had construed the law (e.g. its plain language) to mean. "*McMann* . . . rejected the contention that the purposes of the Act can be distinguished from the Act itself: 'The distinction relied on is untenable because the Act is the vehicle by which its purposes are expressed and carried out.'"[227] Thus, if in a case like *Patterson*, the "plain language" for-

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224 *Id.* at 1154-55 (citation omitted); *see also id.* at 1153 n.9. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), held that counsel fee awards to prevailing plaintiffs in Title VII cases were to be awarded under a standard more liberal than that for prevailing defendants.

225 *Patterson*, 491 U.S. at 222.

226 *Lorance*, 490 U.S. at 916.

227 *Betts*, 492 U.S. at 176 (quoting United Air Lines, Inc. v. McMann, 434 U.S. 192, 198 (1977)).

bids discrimination in hiring, but permits race-based dismissals, that peculiar result is by definition the purpose of the law. In *Shaw* and *West Virginia University Hospitals*, the majority offered a different argument, explaining that "purpose" and "policy" could play no role in statutory interpretation because the *courts* had no authority to adopt policies or seek to achieve purposes of their own selection.[228] Justice Stevens correctly noted in the latter case that this argument was entirely unresponsive to complaints that the majority's interpretation frustrated the purposes and policies of Congress.[229] The Court in *Martin v. Wilks*[230] insisted it simply did not matter whether its decision would frustrate enforcement of Title VII.[231]

It is readily apparent that many of the overturned opinions would have been decided differently had the majority given weight to whichever interpretation of the statute at issue would have advanced the underlying congressional purpose. That very approach, eschewed by conservative Justices in these civil rights decisions, has been enthusiastically applied by them in other non-civil rights cases. Thus, in *Gade v. National Solid Wastes Management Ass'n*,[232] Justice O'Connor, writing for herself, Justices Scalia and White, and the Chief Justice, asserted "[t]he purpose of Congress is the ultimate touchstone."[233] In *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*,[234] Justice Scalia, in an opinion joined by Justices Thomas, O'Connor, Souter, White, and Stevens, focused on "'Congress' primary goal'" in enacting the statute at issue.[235] In *Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*,[236] Justice O'Connor, in an opinion joined *inter alia* by Justices Powell and White and then Chief Justice Burger, insisted

228 *Shaw*, 478 U.S. at 321 ("'Courts lack the power to award interest . . . on the basis of what they think is or is not sound policy.'") (quoting United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 663 (1947)).

229 *West Virginia Univ. Hosps.*, 111 S. Ct. at 1148 (it "is not for judges to prescribe" what is "the *better* disposition") (emphasis in original).

230 490 U.S. 755 (1989).

231 *Id.* at 766-68.

232 112 S. Ct. 2374 (1992).

233 *Id.* at 2381-82.

234 112 S. Ct. 2447 (1992).

235 *Id.* at 2453 (quoting Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275, 280 (1972)).

236 459 U.S. 297 (1983).

the law there at issue "be liberally construed in conformance with its purpose."[237]

This reliance on congressional purpose, routinely invoked by all members of the Court in other cases and a recurring theme of the dissents in the overturned civil rights cases, is consistent with the realities of the legislative process. It is beyond the ability of any Congress to consider, not to mention set out in text or legislative history, what outcome it wants in every possible situation that may some day arise under a given statute. What Congress does know and intend, of relevance to every case, is the general result it enacted a statute to bring about. Although only a handful of Representatives and Senators are, indeed could be, familiar with the actual text of the thousands of pages of legislation enacted each year, virtually every member of Congress understands the general purposes of most pieces of legislation.

When courts are confronted by circumstances that Congress did not expressly consider and address, there is no specific congressional intent—as to the result in that case—to be found in the language or legislative history. In such a case, the general purpose of the legislation is not the best guide to statutory interpretation, it is the only meaningful guide. Actual statutory construction is complicated, of course, by the fact that Congress does not expressly label the situations it has not specifically considered. Thus, a court often cannot be sure whether the apparent hints of meaning in a statutory phrase or a committee report are the inartful expression of a specific congressional decision, or the unintended implications of a passage written to address some entirely different issue. Consideration of congressional purpose is therefore always prudent, because a court cannot ordinarily, or at least prudently, be confident that other indicia of meaning are indeed meaningful, let alone conclusive.

Unlike the often difficult search for specific congressional intent with regard to a particular question, the underlying general purpose of a statute or provision is ordinarily readily apparent. Frequently, that purpose is entirely obvious from the text and title of the law. If there is difficulty in determining which alternative construction will advance the statutory purpose, it is most likely to concern the often practical judgments which must be made regarding the real world consequences of those interpretations. Even this, however, seems far less likely to provoke controversy than, for

237 *Id.* at 315-16 (Justice Rehnquist joined in the result).

example, parsing the opaque or vague language of a statute. Thus, no one could seriously have denied that the construction urged by the dissents in *Patterson*, *Wards Cove*, and *Lorance* would have increased protection against discrimination, that the availability of expert witness fees in *West Virginia Hospitals* would have increased access to the courts, or that prejudgment interest in *Shaw* would have provided to federal employees the same remedies as were available to private plaintiffs.

V. THE ACTIONS AND VIEWS OF LATER CONGRESSES

In almost half of the overturned cases, the dissents relied in part on actions taken by Congress subsequent to the enactment of the statute in issue, including specific postenactment legislative consideration of the particular question of statutory interpretation before the Court. In most instances, the majority chose simply to ignore that information, without even bothering to explain why it should not be considered. The few majority opinions which do discuss this source of guidance insist that it is so inherently unreliable as to be unusable. Thus, the *Betts* majority insisted that postenactment legislative debate "is of little assistance,"[238] and the *Patterson* majority suggested that it is "'impossible to assert with any degree of assurance'"[239] what significance should be attached to any congressional action short of an express and controlling amendment to the statute at issue. *Patterson* warned of the "danger of placing undue reliance" on postenactment developments.[240] The action of Congress in overturning *Patterson* demonstrated that, to the contrary, the greater danger lay in placing insufficient reliance on such developments.[241]

In other cases, the Court has been entirely willing to rely on postenactment developments in interpreting a statute. In the 1989 decision in *Patterson*, five members of the Court dismissed as irrelevant the fact that Congress had rejected an amendment that would have achieved the result adopted by the majority opinion. But in 1992, three of those Justices, including the author of the

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238 *Betts*, 492 U.S. at 168.

239 *Patterson*, 491 U.S. at 175 n.1 (quoting Johnson v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting)).

240 *Id.*

241 As authority for its insistence on dismissing such developments as useless, *Betts*, ironically, cited *McMann*, *Betts*, 492 U.S. at 168, which, of course, had been overturned by Congress as wrongly decided.

Patterson decision, joined a majority opinion which relied on just such a rejected amendment in interpreting the Internal Revenue Code.[242] In a 1992 criminal case, the Court relied on mere congressional inaction, although there was no suggestion that legislation inconsistent with the majority interpretation had ever been voted down or even proposed.[243] The conservative majority in *Grove City*, although imposing a harsh program-specificity requirement, held that federal scholarships did constitute federal assistance triggering application of Title IX and other anti-discrimination statutes. The latter aspect of the Court's opinion insisted that postenactment developments provided "[p]ersuasive evidence of Congress' intent concerning student financial aid," citing rejection of one amendment, failure to act on other proposals, and a Senate speech regarding that amendment given four years after the enactment of Title IX itself.[244] The very postenactment history which *Patterson* dismissed as unusably ambiguous, was expressly relied on by seven members of the Court in *Runyon v. McCrary*,[245] who announced that "[t]here could hardly be a clearer indication of congressional" intent.[246]

Interpreting postenactment legislative developments *is* a difficult and at times hazardous undertaking. Congressional inaction may indeed mean nothing at all, and statements, particularly by individual members of the House and Senate, may be unreliable or uninformed. But to acknowledge that the meaning in these developments may be difficult to detect is not to suggest it may cavalierly be ignored. The failure of the overturned decisions in this regard is not that they misinterpreted the relevant postenactment legislative actions and statements, but that they made no serious effort to assess their content and possible importance.

Betts, for example, asserted that postenactment statements by legislators and committees are *all* entitled to little weight, citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*[247] The indi-

242 United States v. Burke, 112 S. Ct. 1867, 1871 n.6 (1992).

243 Evans v. United States, 112 S. Ct. 1881, 1889-90 (1992) (the majority opinion was joined by Justices White, Souter, and O'Connor).

244 *Grove City*, 465 U.S. at 567, 568 n.19.

245 427 U.S. 160 (1976).

246 *Id.* at 175. *Runyon* in turn cited two other instances in which the Court had relied on the failure of Congress to enact proposals introduced but never voted on. Flood v. Kuhn, 497 U.S. 258, 283 (1972); Joint Indus. Bd. of Elec. Indus. v. United States, 391 U.S. 224, 228 n.6 (1968).

247 447 U.S. 102 (1980).

vidual statement unsuccessfully cited by the petitioner in *Sylvania* had been made by Senator Moss. The Court noted there that Moss had actually disagreed with the relevant section at the time it was enacted, and concluded that "[h]is statement is *thus* not one that provides a reliable indication as to congressional intention."[248] In *Betts*, on the other hand, the postenactment statement cited by the petitioner, and disregarded by the majority, had been made by Senator Javits in 1978.[249] Senator Javits was the author of the very 1967 provision at issue,[250] and the meaning of his *pre*-enactment remarks was central to the dispute before the Court.[251] The Senate report overturning *Betts* expressly cited Senator Javits' postenactment statements.[252] It is indicative of how artificial the Court's methodology had become that in 1989 seven members of the Court insisted that they knew far better what Javits himself had originally meant in 1967, than had Senator Javits himself in 1978.

In *Sylvania*, the petitioner also unsuccessfully invoked a sentence in a postenactment conference committee report.[253] The Court noted that the sentence had little relationship to the matter before the conference committee, and was not repeated elsewhere in the legislative history of the subsequent legislation involved. "In light of *this* background," the Court concluded, "the statement of the Conference Committee is far from authoritative as an expression of congressional will."[254] In *Betts*, on the other hand, the conference committee report at issue, expressly rejecting the Supreme Court's holding and reasoning in *McMann*,[255] was central to congressional rejection of *McMann*. That rejection report was, as the *Betts* majority conceded, reiterated throughout the legislative history.[256]

The *Patterson* majority held hopelessly ambiguous the same legislative development that the Court had found crystal clear only

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248 *Id.* at 118-19.

249 *Betts*, 492 U.S. at 191 n.9 (dissenting opinion).

250 *Id.* at 178.

251 *Compare id.* at 178-79 (majority opinion) *with id.* at 190 n.8 (dissenting opinion).

252 S. REP. NO. 263, 101st Cong., 2d Sess. 9-10 (1990).

253 *Sylvania*, 447 U.S. at 117-20.

254 *Id.* at 120.

255 H.R. REP. NO. 950, 95th Cong., 2d Sess. 8 (1978), quoted in *Betts*, 492 U.S. at 167-68.

256 *Betts*, 492 U.S. at 168 (citing remarks by Rep. Waxman, Rep. Hawkins, and Sen. Javits). Similar statements were made by Senator Williams and Representatives Weiss and Pepper. S. REP. NO. 263, 101st Cong., 2d Sess. 10 (1990).

thirteen years earlier. The event at issue was the rejection in 1972 of the unsuccessful Hruska Amendment, which would have made Title VII the exclusive remedy for private discrimination in employment. The *Patterson* Court insisted that rejection of that amendment did not reflect any congressional approval of section 1981 employment discrimination actions against private employers, dismissing the incident as "the *failure* of an amendment to a *different* statute offered *before* our decision in *Runyon*."[257] In other cases, however, the Court has repeatedly attached significance to the rejection of such proposals. The fact that the Hruska proposal would have amended Title VII rather than section 1981 seems entirely beside the point; both Senator Hruska and those who opposed his amendment understood it was directed specifically at limiting the scope of section 1981.[258] The majority's emphasis on the fact that this occurred before *Runyon* implies that Congress in 1972 could not have been concerned with private section 1981 actions, since the Supreme Court itself did not approve such actions until the 1976 decision in *Runyon*. The debates made clear, however, that Congress nonetheless understood section 1981 to apply to private conduct,[259] relying, as did the Court in *Runyon*, on the 1968 decision in *Jones v. Alfred H. Mayer Co.*[260] Indeed, even *before Runyon*, the Supreme Court itself had held that the applicability of section 1981 to private employers was already "well settled among the Federal Courts of Appeals."[261] In short, *Patterson*, like *Betts*, falls well short of a serious effort to ascertain the actual significance of the relevant postenactment events.

There are several identifiable reasons why in many of the overturned decisions postenactment developments would have provided a reliable tool for interpreting the statutes at issue. Often many members of a later Congress had served in the earlier Congress that enacted the statute in question. In some instances, such as Senator Javits' explanation of the Javits Amendment, later remarks or actions are direct evidence of the specific intent and understanding of the Congress that originally enacted the statute. Even where a subsequently arising issue was not considered by the original Congress, still serving members from that earlier era are likely to recall full well the purpose of the original legislation, and

257 *Patterson*, 491 U.S. at 175 n.1 (emphasis in original).
258 *See* debates cited *id.* at 202-03 (dissenting opinion).
259 *See id.*
260 392 U.S. 409 (1968).
261 Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975).

thus to be uniquely able to assess the impact on that purpose of the proposed alternative interpretations. Frequently, the Supreme Court's interpretation of a statute turns on the Court's evaluation of the practical consequences of its decision. Postenactment action may reflect the assessment of those same issues by Congress, which is often better able than the Court to evaluate such practical issues. Thus, in *Patterson*, the majority relied in part on its view that a narrow interpretation of section 1981 was needed so that employees could not "circumvent" the Title VII administrative procedures.[262] This is precisely the concern which Congress considered when it rejected Senator Hruska's argument that a limitation on section 1981 was necessary so that plaintiffs could not "completely bypass" those procedures.[263] Because of its greater familiarity with both government agencies and the realities of life outside the courtroom, Congress may also see that the consequences of an interpretation would frustrate a statute because of a practical problem a court might overlook. Thus, in rejecting the Hruska amendment, Congress was concerned about plaintiffs for whom Title VII[264] might be unavailable, a problem which loomed large in explanations of the 1991 Civil Rights Act,[265] but which the *Patterson* majority seemingly failed to consider. The contrary views of even new members of Congress should undermine the Court's view that the statute contains "plain language" dispositive of an issue. This highlights the possibility that the Court may be using a "plain language" methodology very different from the way in which ordinary members of the House and Senate actually read legislation.

Subsequent, more specific legislation on the same or a related subject may provide an important aid to statutory interpretation. At times, Congress establishes only general principles when it first addresses a given problem. Later, more specific statutes may well reflect an informed evaluation of how those principles should be implemented in a more particular situation, an implementation reflecting Congress' understanding of the principles themselves and of the practical issues raised by that specific situation. For exam-

262 *Patterson*, 491 U.S. at 181.

263 118 CONG. REC. 3368-69 (1972).

264 *Id.* at 3370 (remarks of Sen. Javits).

265 S. REP. NO. 315, 101st Cong., 2d Sess. 12 (1990) (section 1981 alone covers employers with less than 15 employees and discrimination in contracting unrelated to employment); H.R. REP. NO. 644, 101st Cong., 2d Sess., pt. 1, at 88 (1990); H.R. REP. NO. 644, 101st Cong., 2d Sess., pt. 2, at 42 (1990).

ple, during the years between the 1964 enactment of Title VII and the 1976 decision in *General Electric Co. v. Gilbert*,[266] Congress had adopted a statute treating pregnancy-related illnesses like all other forms of sickness under the Railroad Unemployment Insurance Act.[267] Congress had also expressly endorsed a Title IX regulation forbidding pregnancy-based discrimination in benefits.[268] This congressional exposition of the anti-discrimination principle would have been a more reliable guide for elucidating Title VII than the Supreme Court's 1974 interpretation of the general requirements of Equal Protection in the century-old Fourteenth Amendment.[269] Similarly, in *Smith v. Robinson*,[270] the earlier statute, the Education of the Handicapped Act ("EHA"),[271] did not address the question of whether successful plaintiffs could be awarded counsel fees. At the time, virtually unanimous lower court decisions held that such fees could be awarded in any litigation under statutes such as the EHA, without any need for specific statutory authorization. The Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,[272] held that counsel fee awards ordinarily required express statutory authorization, thus forcing Congress to focus more specifically on this aspect of civil rights remedies. In 1976,[273] and again in 1978,[274] Congress adopted legislation, literally applicable to the type of violation at issue in *Robinson*, authorizing counsel fees. The *Robinson* majority misread the silence of the EHA as an explicit rejection of counsel fees. The Court's decision would not have been overturned by Congress had the Court recognized in the 1976 and 1978 acts a specific congressional evaluation of a practical problem not expressly dealt with in the EHA.

Robinson, and to some degree *West Virginia University Hospitals*, rest on an entirely unrealistic attitude toward the legislative pro-

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266 429 U.S. 125 (1976).

267 Pub. L. No. 90-257, § 201(a), 82 Stat. 23 (1968) (codified at 45 U.S.C. § 351(k)(2) (1988)).

268 45 C.F.R. § 86.57 (c) (1992) (originally enacted in 1972, 86 Stat. 373, 374, 20 U.S.C. §§ 1681-1682). This regulation was promulgated on June 4, 1975. 40 Fed. Reg. 24137 (1975).

269 *Gilbert*, 429 U.S. at 133-34 (citing Geduldig v. Aiello, 417 U.S. 484 (1974)).

270 468 U.S. 992 (1984).

271 20 U.S.C. §§ 1400-1485 (1988).

272 421 U.S. 240 (1975).

273 Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1988)).

274 Pub. L. No. 95-602, § 505, 92 Stat. 2982 (1978) (codified at 29 U.S.C. § 794a (1988)).

cess, an attitude that poses serious problems for Congress. These decisions proceed as if every Congress is entirely omniscient, foreseeing every issue and problem that may arise at a later time and be addressed by subsequent legislation. Thus, if a 1980 law contains a remedy not mentioned in a 1960 law, the Court infers that the 1960 Congress specifically intended to reject that remedy. In reality, the 1980 Congress may well have been addressing with specificity an issue that the 1960 Congress did not consider, or a problem that for practical or legal reasons simply did not exist two decades earlier. By this logic, whenever Congress enacts legislation with a new degree of specificity in one area, the Court will construe all earlier laws more narrowly as a consequence. Legislation enacted to increase remedies may, overall, have precisely the opposite effect. Responding to this perverse result, the drafters of the 1991 Civil Rights Act at one point considered including language stating: "In interpreting Federal civil rights laws, . . . courts . . . shall not rely on the amendments made by the Civil Rights Act of 1990 as a basis for *limiting* the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act."[275] When a new piece of legislation addresses an issue with an increased degree of specificity, it is often impracticable for Congress to review every related or analogous existing statute to insert the same language. Rather than giving such later specific legislation the effect of narrowing earlier laws, the Court should look to the more specific subsequent legislation as a guide to interpreting the earlier more general measures.

Deference to congressional interpretation of earlier laws is often essential to give full effect to subsequent legislation. The courts often assert that Congress is presumed to know the law when it adopts a statute; "presume" is usually the pivotal word, because the doctrine is ordinarily invoked precisely because there is no evidence that any member of Congress actually knew anything about the legal principle the court intends to invoke. But almost every piece of legislation is adopted in the context of some other law, or perceived law, in the same area. Whether the terms of a statute will have the effect Congress obviously intended depends

275 H.R. REP. NO. 644, 101st Cong., 2d Sess., pt.2, at 5 (1990) (emphasis added); *see also id.* at 42 ("The Committee does not want its efforts to restore protections that have historically been accorded to civil rights claimants under Title VII and Section 1981 to be construed as somehow narrowing the rights and remedies available under any other federal civil rights statutes.").

on the continued vitality of that perceived legal context. A change in that context can give the statute an effect Congress never intended, or render it devoid of any effect at all. Suppose that Congress, intending to make a grant to California, directs the funds to "any state within the definition of section X," understanding that the previously enacted section X, referring to "the biggest state," meant California. A subsequent decision that "biggest" referred to size, not population, would redirect the funds to Alaska. Equally important, an interpretation clearly pivotal to the meaning of some later statute represents the considered judgment of the full Congress, not an individual member or committee.

In other contexts, the Court has recognized the importance of such subsequent legislation. In *United States v. Burke*,[276] the Court was required to determine whether the exclusion from taxable income of "damages received on account of personal injuries or sickness"[277] encompassed nonphysical injuries. In holding that it did, the Court noted the section had subsequently been amended in 1989 to allow exclusion of punitive damages from income only in cases involving "physical injury or physical sickness." "The enactment of this limited amendment addressing only punitive damages," the Court reasoned, "shows that Congress assumed that other damages (i.e., compensatory) would be excluded in cases of both physical *and* non physical injury."[278] The manifest intent of the 1989 amendment, to allow exclusion of compensatory but not punitive damages for nonphysical injury, would have been thwarted had the Court construed the underlying statute to bar exclusion of any damages related to nonphysical injuries.

A number of the overturned decisions involved just this problem. In *Aramco*, for example, Congress had amended the ADEA in 1983 to expressly authorize extraterritorial application so that the ADEA would be *coextensive* with Title VII. Lower court decisions prior to 1983 had held that only Title VII, not the ADEA, would apply to American citizens working for American firms abroad.[279] The 1991 majority opinion in *Aramco* created precisely the sort of anomaly Congress thought it had eliminated eight years earlier.[280] Prior to *Grove City*, Congress in 1974 had amended Title

276 112 S. Ct. 1867 (1992).

277 26 U.S.C. § 61(a) (1988).

278 *Burke*, 112 S. Ct. at 1872 n.6 (emphasis added).

279 *Aramco*, 111 S. Ct. at 1244 n.7 (dissenting opinion).

280 The existence of such an anomaly can have potentially serious consequences. Prior to 1983 an intent to discriminate on the basis of age was a potential defense to a

IX to exempt college fraternities and sororities, organizations affiliated with federally assisted colleges but not themselves operating federally assisted programs. The manifest intent of this legislation, like the amendment in *Burke*, was to treat fraternities and sororities differently than other parts of the institutions not receiving federal funds.[281] The *Grove City* opinion obliterated that distinction. Congress may also rely on its understanding of prior statutes in deciding to reject subsequent proposals as superfluous. A decade prior to *Mobile v. Bolden*,[282] Congress, in renewing the Voting Rights Act, declined to include a provision authorizing suits against practices with "the purpose or effect" of discriminating, explaining that such suits were already authorized by section 2 of the original Act.[283] Judicial indifference to congressional understanding of prior laws may in these and other circumstances substantially contribute to the problems of an already overburdened Congress.

In determining whether to apply the doctrine of stare decisis, the Supreme Court consistently and sensibly assesses whether the principles of subsequent legislation are consistent with the Court's interpretation of the prior law. Thus in *Patterson*, the majority, in adhering to its decision in *Runyon* that the 1866 Civil Rights Act forbade private discrimination, emphasized that adherence to that interpretation was buttressed by the fact that

> [i]n recent decades, state and federal legislation has been enacted to prohibit private racial discrimination in many aspects of our society . . . . *Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race . . . .
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> "[M]yriad Acts of Congress . . . attest a firm national policy to prohibit racial segregation and discrimination."[284]

In deciding whether section 1981 applied to discrimination in the form of racial harassment, however, the majority saw no value in the fact that such an application would also have been consistent with those "myriad acts," which treated racial harassment like any

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Title VII claim. Under *Aramco*, an intent to discriminate on the basis of race or sex became a potential defense to an ADEA claim.

281 *Grove City*, 465 U.S. at 596 n.11 (dissenting opinion).

282 446 U.S. 55 (1980).

283 *See* S. REP. NO. 417, 97th Cong., 2d Sess. 18 (1982).

284 *Patterson*, 491 U.S. at 174, 191 (quoting Bob Jones Univ. v. United States, 461 U.S. 574 (1983)).

other form of discrimination. On the contrary, the fact that Title VII "attest[ed] a firm national policy to prohibit racial" harassment on the job was, for the Court, a persuasive reason to interpret section 1981 in precisely the opposite manner.[285] If congruence with subsequent legislation is a sound reason for adhering to the interpretation of an earlier law, surely it must support that very same interpretation if it arises as a question of first impression.

VI. CONCLUSION

The pattern of legal reasoning in the sixteen overturned decisions, and in the respective dissents, is surprisingly instructive. A review of these cases might have revealed that the majority and dissenting opinions, having considered the same body of information and utilizing identical standards, simply arrived at different conclusions. Reasonable jurists can and do disagree in situations of that sort, and such disagreements would not have been particularly enlightening. The conflicts in these cases regarding the meaning of the disputed legislative histories are of this type; no particular conclusions can be drawn for future cases regarding how most accurately to interpret legislative debates and reports.

But in several other respects, the majority and dissenting opinions were divided by clear differences regarding the appropriate methods and rules of statutory interpretation. It is possible to identify specific methodologies that produced the errors in these cases and to delineate particular rules of construction which would have led the Court to the correct results. The errors—regarding plain language, presumptions, problems, and the actions of later sessions of Congress—share a common characteristic. All operate in one fashion or another as an exclusionary rule, a rationale for deliberately ignoring available information regarding the meaning of a statute. The exclusions are so severe that language clear enough to exclude consideration of legislative history could itself be excluded from consideration by the existence (or creation) of a presumption. Exclusion of relevant and reliable evidence of congressional intent has precisely the same deleterious effect as the exclusion of improperly seized evidence, an exclusion which conservatives regularly denounce as interfering with the truth-finding function of the courts. It is hardly surprising that, having expressly refused to consider so much of the available information regard-

285 *Id.* at 180-82.

ing congressional intent, the Supreme Court erred so often. Indeed, it would have been surprising if such a deliberately uninformed process had produced results with which Congress agreed.

The characteristic most common to the overturned decisions is that they expressly or tacitly exclude from consideration most if not all of the material that might have guided and constrained the Court's interpretation—legislative history, statutory purpose, and subsequent congressional action. In a recent non-civil rights case, Justice Scalia complained that absent an "agreed-upon methodology for . . . interpreting text" it would no "longer make[] sense to talk of 'a government of laws, not of men.'"[286] But an agreed-upon methodology which lacks any real standards and which systematically ignores most available information is as lawless as a practice of changing methodology from case to case. An interpretive methodology unconstrained by any consideration of legislative history, purpose, or subsequent action, bears an uncanny resemblance to the standardless discretion exercised prior to and arguably even since *Furman v. Georgia*[287] in deciding whether capital defendants would live or die.

Some of this may be the result of a now ended historical era. As the fight over the Civil Rights Act and other legislation made clear, from 1981 to 1992 new laws could be enacted, in effect, by five Justices, the President, and thirty-four Senators—the Justices to "re-interpret" some existing law and the President with one-third-plus-one of the Senate to prevent corrective legislation. A majority of the Court may have believed that a likely legislative gridlock gave it the power, as a practical matter, to interpret laws in any way it pleased; or, less harshly put, a conservative majority would have had little (or less) reason to worry that interpretations thwarting the will of Congress would be overturned. The change of administrations has dramatically altered that situation. Today, conservative interpretations of civil rights laws which ignore the will of Congress will be worse than wrong; they will simply be ineffective. Given the ease and speed with which such misinterpretations might be overturned by a Democratic Congress and President, decisions like those handed down in the spring of 1989 would be largely a waste of the Court's time.

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286 Patterson v. Shumate, 112 S. Ct. 2242, 2250-51 (1992) (concurring opinion).
287 408 U.S. 238 (1972).

But the lessons to be gleaned from the fate of the sixteen overturned decisions could assuredly be put to good use in other areas of the law. The same methodological issues arise in the interpretation of non-civil rights statutes. There, the choices of methodology do not fall along the ideological lines seen in the overturned civil rights cases. On the contrary, conservatives at times use the methodologies of the civil rights dissents, while liberals in some instances apply the methods of the overturned majority opinions. In *Gade v. National Solid Wastes Management Ass'n*,[288] for example, the majority relied on a limiting problem, while the dissent relied on a presumption. On the other hand, in *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*,[289] both the majority and dissenting opinions focused on the purpose of the statute at issue. In other recent instances, the methodological differences at issue in the overturned civil rights cases clearly were of controlling importance. Thus, in *Estate of Cowart v. Nicklos Drilling Co.*,[290] a majority of the Court relied on what it insisted was the "great clarity" of the statutory language,[291] while the dissent, including Justice O'Connor, preferred the result which advanced the "purposes and policies" of the law.[292] In *United States v. Thompson\Center Arms Co.*,[293] five members of the Court found the statutory language unclear and relied on an apparently weak presumption, four Justices dissented on the ground the statutory language was in fact clear, and Justice Stevens, who joined that dissent, offered the only analysis which considered the purpose of the legislation. In these and other future cases, the reasoning, and at times the result, would be different if the Supreme Court were now to take to heart the lesson in statutory interpretation taught by the 1991 Civil Rights Act and the corrective legislation which preceded it.

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288 112 S. Ct. 2374 (1992).
289 112 S. Ct. 2447 (1992).
290 112 S. Ct. 2589 (1992).
291 *Id.* at 2598.
292 *Id.* at 2603.
293 112 S. Ct. 2102 (1992).